

April 20 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

FORM TO BE USED BY PRISONERS FILING A

PETITION FOR A WRIT OF HABEAS CORPUS

UNDER MONT. CODE ANN. § 46-22-101 et seq.

FILED

NAME Ron Glick

APR 20 2010

PRISON NUMBER 2100185

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

PLACE OF CONFINEMENT 24 1st Ave. W. #105B, Kalispell

CRIMINAL CAUSE NUMBER DC 04-06617

Ronald Dwayne Glick, Petitioner
(Full Name)

v.

Montana Department of Corrections, Respondent
(Name of Warden, Superintendent, or authorized person
having custody of Petitioner).

Instructions

1. To use this form, you must be imprisoned or otherwise restrained in Montana. Mont. Code Ann. § 46-22-101(1).
2. The petition must be neatly handwritten or typed. You must tell the truth and sign the form. If you make a false statement of a material fact you may be prosecuted for perjury.
3. The petition can be filed either in the district court in the county where you are incarcerated, or in the Montana Supreme Court. If you are filing in the district court, send the original to the clerk of the district court in the county where you are incarcerated. If you are filing in the Montana Supreme Court, send the original to the clerk of the Montana Supreme

Court. Also, mail a copy of the motion to each party listed on the Certificate of Service.

4. Habeas corpus cannot be used to attack the validity of your conviction or sentence. Also, it cannot be used to attack the validity of an order revoking a suspended or deferred sentence. Mont. Code Ann. § 46-22-101(2).
5. To get habeas corpus relief, you must show that your imprisonment or restraint is illegal. For example, you may allege that you will be held beyond your proper release date because of failure to properly award good time or credit for time served; that your sentence exceeds the statutory maximum term; that a decision of the parole board results in longer confinement; or that you are being illegally held without bail.
6. If you have any questions about these instructions or about the form, please seek assistance from the designated legal assistant in the institution. IT IS A VIOLATION OF POLICY FOR INMATES TO REQUEST LEGAL ASSISTANCE FROM OTHER INMATES.

PETITION FOR HABEAS CORPUS RELIEF

1. I was convicted of the following criminal offense(s): Sexual Assault

_____.
2. Judgment on these offenses was entered on (date) 12/1/05.
3. I received the following sentence: 20 years w/15 years suspended

_____.
4. Check one: () I pled guilty to these offenses.
(☒) I pled not guilty to these offenses.
5. Check one: (☒) I appealed to the Montana Supreme Court.
() I did not appeal to the Montana Supreme Court.

6. Other than a direct appeal from the judgment of conviction, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? () Yes (☒) No.

7. If your answer to question 6 was yes, give the following information:

Name of Court: _____

Nature of Proceeding: _____

Grounds Raised: _____

Result: _____

8. I assert that I am entitled to habeas corpus relief upon the following grounds:

GROUND ONE: Petitioner was deprived of his right to effective assistance of counsel...

SUPPORTING FACTS: See attached memorandum.

GROUND TWO: Petitioner was deprived of his rights to confrontation and compulsory process...

SUPPORTING FACTS: See attached memorandum.

GROUND THREE: Petitioner was unlawfully remanded to the custody of the DOC...

SUPPORTING FACTS: See attached memorandum.

(Additional grounds and supporting facts can be stated separately and attached to this petition).

Wherefore, Petitioner prays that the Court grant relief to which he may be entitled in this proceeding.

VERIFICATION

STATE OF MONTANA)

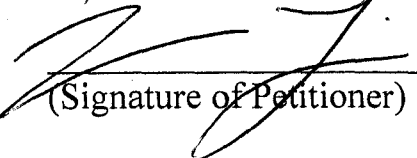
: ss.

County of _____)

I, the petitioner above named, being duly sworn, states as follows:

I have read the foregoing petition for habeas corpus relief and know the contents thereof, and the same is true of my own knowledge, information and belief.

DATED this 19th day of April 19, 2010.

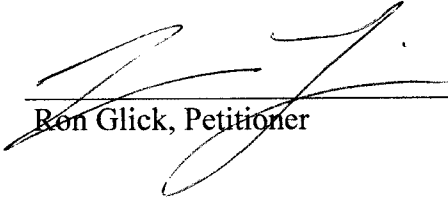

(Signature of Petitioner)

CERTIFICATE OF SERVICE

I do hereby certify, under penalty of perjury, that a true and correct copy of the foregoing Petition and Memorandum were deposited in the US Mail, postage prepaid, addressed as follows:

Montana Attorney General
PO Box 201401
Helena, MT 59620-1401

Dated: *April 19, 2010*



Ron Glick, Petitioner

Ron Glick
24 1st Avenue West #105B
Kalispell, MT 59901
(406) 257-0479 / 871-3893 (cell)
ron_glick@yahoo.com

| | | |
|------------------------------------|---|--------------------------------------|
| Ron Glick, |) | Cause No. |
| |) | |
| Petitioner, |) | Memorandum In Support of Application |
| |) | For Writ of Habeas Corpus |
| v. |) | |
| |) | Evidentiary Hearing Requested |
| Montana Department of Corrections, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

Comes now Petitioner, pro se herein, to hereby provide a Memorandum in Support of his Application For Writ of Habeas Corpus, and to wit:

JURISDICTION

All citizens have the constitutional privilege of writ of habeas corpus to never be suspended (Article II, Section 19 of the Montana Constitution; Article I, Section 9 of the United States Constitution). The effect of a writ of habeas corpus is to vacate conviction and release petitioner from custody (*Capps v. Sullivan*, 13 F3d 350 (10th Cir., 1993)). Since probation is a form of custody, it is proper to use a petition for writ of habeas corpus to contest its continuation (See, *Valona v. United States*, 138 F3d 693 (7th Cir., 1998)).

SUMMARY

The State initially charged Petitioner with the felony offenses of sexual assault and tampering with a witness, based on allegations that he inappropriately touched L.P., a minor, on one occasion and that he subsequently forced L.P. to sign an affidavit in which she recanted her statements regarding the alleged touching incident. Eduardo Gutierrez-Falla, aka Ed Falla, was appointed by the district court to

represent Petitioner.

The trial date was reset several times, with Petitioner's objections to speedy trial rights being ignored, and Petitioner sought to remove Falla and to appoint substitute counsel upon several occasions. The district court held hearings on Petitioner's complaints on two of said occasions, and in both instances denied the request to remove Falla.

At both hearings, Petitioner was compelled to act as his own counsel and was repeatedly opposed by Falla, the State and the judge in the cause, Katherine Curtis. At the second hearing, Falla moved the district court for a determination as to whether he had a conflict of interest and to either replace him or appoint co-counsel. The motion was based upon representations made by Falla to the effect that while representing Petitioner, Falla also represented two persons whom the State intended to call as witnesses against Petitioner. Following said hearing, the district court determined that Falla did not have a conflict of interest, yet nevertheless appointed co-counsel, David Stufft.

Shortly before trial, the State amended the Information by dismissing the tampering charge and Petitioner stood trial upon the sole charge of sexual assault. One of Falla's former clients testified against Petitioner. Mr. Stufft handled all trial matters regarding Falla's former client, with Falla himself actually removing himself from the courtroom entirely during said witness' examination.

Petitioner was subsequently convicted and the district court sentenced him to a term of twenty (20) years imprisonment, with fifteen (15) of those years suspended. Petitioner timely appealed the conviction, though following a new evidentiary hearing, this Court affirmed the conviction, though failed to address many of the issues raised in Petitioner's appeal. Petitioner sought to have his appellate counsel, William Hooks, file a motion for reconsideration, but after an unreasonable delay, Mr. Hooks declined to do so. Petitioner sought an extension of time to file his own motion for reconsideration, but the Court rejected his filing.

Upon release from prison, Petitioner was remanded to the custody of the Montana Department of Corrections, to be supervised by the Department of Probation and Parole, to serve a probation sentence that would run concurrently with his fifteen (15) year suspended sentence. However, Petitioner was never specifically sentenced to serve a probationary sentence by his sentencing court, and is presently being unlawfully detained in consequence.

Since being remanded to probation, Petitioner's probation officer, Dave Edwards, has pursued every opportunity to harass and intimidate him in an effort to compel an admission of guilt. Edwards has attempted to revoke Petitioner, for which Plaintiff served six weeks in jail, and has sought and obtained modification of Petitioner's sentence, without probation violation nor disciplinary report, to such an extreme that Petitioner must remain confined to his residence for fear of revocation.

Petitioner now submits the issues herein through a timely filed application for writ of habeas corpus in order to exhaust state remedies before pursuing a federal habeas corpus.

STATEMENT

The State filed the Information against Petitioner on February 20, 2004, over seven (7) months from the date of the initial report of the allegation. It alleged that sometime in June or July, 2003, L.P., a thirteen (13) year old girl, was lying on a couch with Petitioner and that he touched L.P.'s breasts under her shirt and put his hand down the front of her pants. Petitioner was initially arrested on February 20, 2004, in Goldendale, Washington, and was extradicted to Kalispell, MT, in or around April, 2004.

Ed Falla was appointed to represent Petitioner on or about April 14, 2004.

Falla filed numerous motions to continue the trial date. Initially, Petitioner's trial was scheduled for in or around July, 2004, but upon Falla's insistence that he could not reasonably prepare for trial, said trial date was extended to in or around October, 2004. The second trial date was subsequently delayed as well through a motion filed on or about September 1, 2004, wherein Mr. Falla additionally informed

the district court that Petitioner had declined to waive his right to speedy trial.

At the hearing upon said motion on or about September 8, 2004, the district court noted that Petitioner had sent the court a letter in June, 2004 (unaddressed previously by the district court, though filed on or about June 10, 2004), but Judge Curtis admitted to not seeing the letter by the time of the hearing several months later. Petitioner informed the district court that his letter had been regarding a refusal of Falla's to communicate with Petitioner regarding a pending omnibus hearing, but that at the time of the then current hearing, he was in fact in communication with Falla, and as such the cause of the letter was then moot. Though Petitioner was provided an opportunity to address the district court during said hearing to add anything additional to the record, he declined to do so in an effort to preserve the then-tenuous relationship with Falla. However, this effort was in vain as the attorney-client relationship between Falla and Petitioner continued to erode thereafter.

At said hearing, Falla advised the district court that he would be unavailable in October, 2004, and the court granted a continuance, resetting the trial date for a second time to February 7, 2005. However, the trial date was yet again delayed in or around January, 2005, to July 11, 2005, at which point Petitioner finally stood trial.

On November 8, 2004, following an extended vacation in or around October, 2004, Falla filed a "Motion To Discharge Undersigned Counsel and to Appoint New Public Defender", representing that the grounds for the request would be made known to the district court by Petitioner. A hearing was held on or about November 10, 2004, and Falla told the district court that the lines of communication between himself and Petitioner were severed. Falla represented that Petitioner had chosen not to meet or discuss the case. Falla proposed to meet with Petitioner prior to proceeding upon the motion, and Petitioner responded that if Falla would like to meet, Petitioner would have no problem doing so, conditional upon there not being a substantial delay and requesting that the district court refrain Falla

from being abusive or derogatory toward Petitioner, which had a been a consistent pattern of Falla's. The district court elected to rebuff Petitioner's request concerning Falla's conduct however and rescheduled the hearing for on or about November 17, 2009, conditional upon that if, after meeting with Falla, Petitioner still wanted to proceed upon his motion to remove Falla as counsel, that he would so notify the district court.

Petitioner thereafter sent two letters two letters to Judge Curtis, both of which being filed on or about November 16, 2004. In one, Petitioner alleged the prosecutor was involved in improprieties in the case in response to a lawsuit Petitioner had filed against the City of Kalispell and Kalispell city officials. In the second letter, Petitioner informed the district court that his meeting with Falla to discuss the issues "ended up a manipulative game of Falla's." Glick concluded that his "relationship with Falla remains irreconcilable."

When the hearing resumed on November 17, 2004, Petitioner was given an opportunity to present his complaints about Falla's counsel, though much of his testimony was badgered by Judge Curtis, who acted as a second prosecutor in the hearing. He testified that there were a number of instances of improprieties by the county attorney which he had called to Falla's attention, but that Falla refused to act upon. These included references to reports produced in discovery which contradicted the affidavit filed by the State in support of the motion to file the Information, and alleged false or perjured statements by one of the prosecuting attorneys, Lori Adams; Petitioner stated that Falla refused to seek dismissal of the Information on the ground that the State had failed to produce sufficient evidence, in addition to the State's affidavit, as required by statute (MCA § 46-11-201(2)); that Falla did not properly contest the adequacy of an investigation undertaken by the Department of Health and Human Services (DPHHS), nor contest the undue influence exerted by said agency over L.P.; that Falla essentially colluded with the State to threaten Petitioner by relaying a specific threat to file additional

charges against Petitioner for writing letters to DPHHS seeking discovery that Falla refused to seek on his own; that Falla did not timely secure discovery of statements and other information, nor file subpoenas for production of records, and that he had in fact turned all evidentiary production over to the State; that Falla refused to file motions requested by Petitioner, including motions to dismiss, change jurisdiction, bond reduction, recusal of judge for cause, call for grand jury (in absence of a grand jury indictment), challenge of probable cause (in absence of a preliminary examination of evidence), joinder with Mara Pelton (L.P.'s mother, whom the State had charged and arrested separately with tampering with a witness, alleging she had participated in compelling L.P.'s recantation, though said charge was later dismissed four days prior to Petitioner's trial), and petition for writ of habeas corpus; that Falla would not conduct legal research; that Falla had willfully misrepresented himself to Petitioner to gain a fraudulent consent to waive Petitioner's speedy trial rights through October, 2004; that Falla had on numerous occasions willfully deceived Petitioner regarding facts in his case; and that Falla had significantly delayed the investigation of Petitioner's defense, in many cases said delay resulting in the unavailability of witnesses entirely. Petitioner also stated that Falla had "a habit of being belligerent, insulting (sic), derogatory, abusive in general." (November 17, 2004, Transcript at 56: 11-14).

At the conclusion of Petitioner's testimony, Falla offered to go through his file and prepare a detailed response. The prosecutor, Ms. Adams, stated she was prepared to address Petitioner's allegations. The district court continued the hearing and asked both Falla and the prosecutor to respond, and told Petitioner that he would be permitted to rebut the issues.

Falla's later comments, at the hearing resumed on or about November 29, 2004, indicated that he thought the district court's options were to maintain Falla's appointment as Petitioner's counsel or to remove Falla, permitting Petitioner to proceed pro se. Falla attested to the district court that while

Petitioner was “very bright,” “he doesn't know, he does not understand how these cases work, he does not understand how to best represent himself[.]” (November 29, 2004, Transcript at 35: 5-8).

Petitioner made it clear that he had no wish to represent himself, having told the district court “I have no ability to proceed pro se, I have no ability to act independently while I'm incarcerated. There's just no way, there's no way I can.” (Ibid, at 60: 21-25). Additionally, Petitioner had filed a complaint against Falla with the Office of Disciplinary Counsel and Falla waived any confidentiality over such for purposes of the hearing in order to permit Petitioner to discuss it. Petitioner offered, and the district court admitted, a written statement as to reasons for Falla's dismissal.

When the hearing resumed on or about November 29, 2004, the prosecutor addressed Petitioner's allegations of misconduct, and referenced to and offered as exhibit police investigative reports (Id, at 5-17). The prosecutor also addressed Petitioner's belief that she had threatened him with additional charges after receiving a letter from him, despite Petitioner's actual allegation being that separate charges were threatened after Petitioner sent a letter to DPHHS (Id, at 17-18). The district court then asked additional questions of the prosecutor based on some of Petitioner's complaints (Id, at 18-20).

Falla then provided background on Petitioner “and the kind of person he is” (Id, at 20). Falla told the district court that Petitioner, while very intelligent, did not understand how things worked and did things without Falla's knowledge. Falla offered exhibit letters that he said Petitioner had sent to the State without Falla's knowledge (Id, at 21-25). Falla supported the prosecutor's response to the effect that she had not threatened Petitioner with additional charges (Id, at 25-26). Falla discussed discovery issues and explained that he did not have the ability to research out-of-state case law (Id, at 27-28). He offered as an exhibit a letter he had written to Petitioner regarding motions (id, at 29).

It became apparent during the hearing that Falla's refusal to file motions requested by Petitioner was a large point of contention between the two. Falla's position was that if Petitioner wanted a motion

filed, he should file it himself, despite the Montana court rules that prohibited pro se filings from a criminal defendant who was represented by counsel. Falla told the district court that “as a matter of personality... [Petitioner] declines to file any of the motions he has in mind, and simply insists that I do it. When I do not do it, and offer him the opportunity of filing it himself with or without my advice, he declines” (Id, at 30: 2-7). Falla said he was willing to review Petitioner's motions and give him advice (Id, at 30), though later testimony of Petitioner's indicated that written motions provided to Falla were essentially ignored, when Petitioner discussed a motion to dismiss that he had already provided to Falla and that Falla had refused to even review (Id, at 81: 5-10). Falla responded that Petitioner should file the motion: “I believe it should properly be presented by him. For tactical defense reasons I believe it is an inappropriate motion, and I do not believe that it furthers his defense to bring it. That being said, he's the boss” (Id, at 73: 13-17). The district court had Petitioner identify motions he wanted to bring which he wanted filed, even if Falla advised that it was not in Petitioner's best interest to do so. Petitioner stated that it was his intent to file these motions.

Falla discussed in detail three examples of “difficulties I have trying to help [Petitioner]” (Id, at 30-35). He concluded that Petitioner was “his own worst enemy” but yet asked that he not be discharged from the case (Id, at 35). Falla also argued that he had not been ineffective and that Petitioner should not be allowed to represent himself (Id, at 36). Falla later told the district court that he would have no problem continuing on the case “either as counsel of record or as stand-by, second chair, whatever this Court feels most appropriate” (Id, at 86: 7-9).

The district court then asked a number of follow-up questions of Falla relative to Petitioner's complaints (Id, at 36-43), after which Petitioner was sworn and provided a limited opportunity to respond to the prosecutor's and Falla's statements (Id, at 43-64). The district court told Petitioner that “what I need to know are your complaints against Falla so that I can decide if you're receiving

ineffective assistance of counsel” (Id, at 54). Petitioner made clear that he was not asking to represent himself (Id, at 60-61). The district court received a written statement from Petitioner after declining to permit him to read the content of such into the record (Id, at 63-64).

Then the prosecutor was again permitted to rebut Petitioner's testimony, offering two exhibits for this purpose (Id, at 64-68). Falla likewise was given an opportunity to rebut his client's testimony, and did so (Id, at 68-77). He offered another exhibit to impeach Petitioner's statements to the district court (Id, at 70-71, 78). Petitioner then returned to the witness stand to address what the prosecutor and Falla had said in their rebuttals (Id, at 78-85).

At the conclusion of the hearing, Judge Curtis asked counsel for the State to prepare findings of fact and conclusions of law denying Petitioner's motion (Id, at 87). Judge Curtis determined that she had heard nothing to indicate that Falla had not done everything he could to capably represent Petitioner, and the district court further admonished Petitioner for bringing the motion, cautioning that if Petitioner did not want to end up representing himself, which admittedly he did not want to do, he and Falla would have to find a way to work together. Petitioner was also directed by the district court to stop “inundating” Falla with correspondence (Id, at 88-91).

In spite of the foregoing, in a December 7, 2004, letter, Petitioner once again informed the district court that he wanted Mr Falla removed as counsel.

On or about January 24, 2005, the district court convened a hearing to discuss the decision denying the motion to appoint new counsel. Falla had advised the district court that Petitioner intended to seek review of the Montana Supreme Court through a petition for writ of supervisory control (January 24, 2005, Transcript, at 68-69). The district court expressed its willingness to consider Petitioner's pro se proposed findings and conclusions before it finalized its own, but cautioned that “[t]he bottom line is not going to be different” (Ibid, at 70). Petitioner also stated that he wanted to file the petition for

supervisory control, even if it meant a delay in his trial: "I don't believe I have a choice. I don't believe I can receive a fair hearing under the circumstances with Falla as my counsel" (Id, at 72: 14-17). Petitioner thereafter submitted a several-page long handwritten statement to the district court.

The district court filed its Order denying the request for appointment of different counsel on January 26, 2005. The district court stated that the initial inquiry into the complaints is not intended to address the merits, but nonetheless applied the law regarding ineffective assistance of counsel to Petitioner's complaints. The district court concluded that Petitioner had failed to prove either that Falla's performance was deficient or that Falla's performance had caused Petitioner prejudice (Id).

Petitioner's Application For Writ of Supervisory Control, which he was compelled to file pro se, was consequently denied by this Court.

On or about June 6, 2005, Falla moved for a determination of conflict of interest and for appointment for substitute or co-counsel. In his motion, Falla informed the district court that two persons, Larry Van Alstine and Frank Allen had been added by the State to its witness list. Falla had represented each of these men. The motion submitted by Falla established the following timeline:

| | |
|-------------------|--|
| April 14, 2004 | Falla appointed to represent Petitioner. |
| November 29, 2004 | Falla appointed to represent Van Alstine on charges of sexual intercourse without consent an sexual assault. |
| February 6, 2005 | Van Alstine tells Falla, within attorney-client privilege, that he wants to tell the prosecutor information based on communications with Petitioner. |
| February 9, 2005 | Separate counsel appointed for Van Alstine for purpose of investigation of Van Alstine's information and determining whether it would be useful to the State in terms of prosecuting Petitioner. |
| February 18, 2005 | Falla appointed to represent Allen on a revocation of a previously-imposed probationary sentence for unspecified crime(s). |
| March 23, 2005 | Allen tells Falla, within attorney-client privilege, that he "wished to convey certain information to the Office of the Flathead County Attorney, |

which information allegedly had been obtained during the course of conversations between Allen and [Petitioner].”

Glen Neier appointed to represent Allen and Falla terminates his representation of Allen.

| | |
|--------------|--|
| May 10, 2005 | Falla informed by prosecutor that Van Alstine might be called as a witness against Petitioner. |
| May 13, 2005 | Falla withdraws as Van Alstine's counsel; Neier appointed to represent Van Alstine. |
| May 23, 2005 | Falla informed by prosecutor that Van Alstine and Allen would be called as witnesses. |
| May 24, 2005 | Falla reviews videotaped police interviews of Van Alstine and Allen concerning Petitioner. |
| May 25, 2005 | Falla tells Petitioner that both Van Alstine and Allen would be witnesses against him and summarized for Petitioner the natures of their proposed testimony. |

Falla represented that “[d]ue to all of the foregoing, the attorney-client relationship between the undersigned and [Petitioner] has deteriorated to the point that meaningful communication is effectively impossible” (Id). However, Falla did not believe that he was subject to any conflict of interest “such as to mandate his withdrawal from representation of [Petitioner] in this cause” (Id). He stated that believed that the appointment of co-counsel to try the case with Falla would be in Petitioner's best interests, “principally for the purpose of establishing and maintaining lines of communication with [Petitioner] such as will insure his full and complete participation in his own defense and furthermore for the purpose of cross-examining Allen and Van Alstine in the trial of this cause” (Id).

In a letter filed on June 7, 2005, Petitioner again requested that Falla be discharged as counsel. Petitioner informed the district court that Falla had notified him on May 25, 2005, that Van Alstine and Allen had made allegations that Petitioner had made “incriminatory confessions” (Id). Petitioner further asserted that Mr. Van Alstine had made a statement to the Kalispell Police on March 30, 2005,

while Falla was still Mr. Van Alstine's attorney, and in that statement, Van Alstine's statement "contained information from a document he could only have accessed through Falla" (Id). Mr. Allen also gave a statement to police, on or about April 13, 2005, and while this did not contain the same information, "both statements supplied details alleging a connection to Dick Dasen's¹ prostitution case that could reasonably have come from another client's of Falla's" (Id).

Petitioner denied having made any confession to either man. He added "that both share a common tie through our mutual attorney, and that Van Alstine cited information he could only have obtained through Ed Falla not to mention the potential information from a separate client's file, makes this circumstance highly suspect. Evidence suggests that Falla provided confidential material to his clients with the intent that they manufacture false statements and to assure my conviction" (Id). "Under the circumstances," Petitioner concluded, "I cannot trust Falla to properly defend my interests when he is aiding in manufacturing evidence and further sabotaging my case. I therefore once again request that he be discharged and that I be assigned effective legal counsel pursuant to my Constitutional rights" (Id).

The issue was addressed in a June 9, 2005, hearing. Falla reiterated his belief that he did not have a conflict of interest (June 9, 2005, Transcript, at 3-4). Falla asked Judge Curtis, in part, to appoint co-counsel for the purpose of cross-examining Van Alstine and Allen. Falla said he did not have an ethical issue with cross-examining Allen or Van Alstine, but it would be "difficult" on a "personal level" for him to do so. He also sought co-counsel for the purpose of conducting all further communication with Petitioner. Falla told the judge that Petitioner had filed a second disciplinary complaint against Falla, alleging that Falla had put Allen and Van Alstine up to doing something against Petitioner. Falla also

¹ Richard "Dick" Dasen had been a local businessman whose prosecution had been well known at the time of Petitioner's prosecution. Mr. Dasen was ultimately found guilty of several prostitution-related charges, though his trial was still pending at the time of Messrs. Van Alstine's and Allen's statements, and no relationship was ever officially alleged between Mr. Dasen and Petitioner.

told the district court that Petitioner would not talk to him (Id, at 4-7).

Petitioner reiterated his belief that information in the witness statements could only have come from Falla, and was confidential:

One of the reasons – and it proved valid – is information in those statements by both Mr. VanAlstein (sic) and Mr. Allen that seem to come from confidential information that only Falla could have possibly provided to those individuals particularly. There is also from a transcript that was a typographical error in the transcript that VanAlstein (sic) specifically references that doesn't have any part of the allegation against me, but it was referenced in a transcript that the only way he could have accessed it would be through Falla.

I've also had the opportunity to – and I should note the first and only time I've had to meet with Dick Dasen was just this last Monday, and I have confirmed with him the details that are in that (sic) those statements are also statements that Kim Neise had made against him in his case.

Id, at 8:1-19.

Petitioner noted that “Kim Neise was Mr.Falla's client, [and] that also raised the issue as to where they obtained that information. And the only thing to conclude, and the logical thing I am to conclude, is that any information [they] got through Falla is through any confidential information that Mr. Falla has in his custody” (Id, 8: 24-25; 9: 1-5). Since Neise's information was not publicly known and was subject to attorney-client privilege between Falla and Ms. Neise, this was a reasonable conclusion. Petitioner noted that this was information which he had learned after he filed his complaint with the disciplinary counsel (Id, at 9-10).

The district court granted the motion for co-counsel, yet stated it wanted to review the complaint before deciding whether to appoint substitute counsel. Falla offered to provide the judge with a copy of the complaint (Id, 9-11).

The district court ruled that Falla did not have a conflict of interest, as the only evidence was Petitioner's “conclusory allegations.” Falla was permitted to continue as counsel and David Stufft was appointed as co-counsel on June 14, 2005. On June 20, 2005, the State filed a supplemental notice of

witnesses, adding Messrs. Allen and Van Alstine to the list.

The State sought, and was granted leave, to file an Amended Information on or about July 7, 2005, in which the count of witness tampering was dropped, simultaneously with the charge against Mara Pelton, which Petitioner had previously insisted was only pending as a threat against Ms. Pelton as a witness in his own cause. Trial began on the morning of July 11, 2005, on the sole count of sexual assault.

It was clear from the beginning of the trial that Falla's client, Frank Allen, would play a critical role in the State's prosecution of Petitioner. On the morning of the first day of trial, Petitioner's co-counsel, Mr. Stufft, asked the district court to order that the defense be permitted to see the presentence investigation (PSI) reports prepared in the criminal cases of State's witnesses, Messrs. Allen and Van Alstine (Trial Transcript (Tr.), at 17-18). The district court took the matter under advisement.

The State told the jury in the opening statement that Petitioner fondled L.P.'s breasts and put his other hand down her pants while the two were in the back room of a business (Tr., at 222-24). The prosecutor also told the jury that Frank Allen would testify that Petitioner told Mr. Allen about the alleged touching (Tr., at 227-28).

The defense offered a different premise as to what led to the charges. L.P. told her grandparents and alleged that she had been touched. She was then interviewed by Officer Wilson. And this interview was not properly conducted. DPHHS also initiated an investigation. L.P. was interviewed a second time by Officer Overman, and in this proper interview, L.P. stated that she could not remember or tell if Petitioner was awake or asleep at the time of the incident. Both law enforcement and DPHHS concluded their investigations and no charges were filed. L.P. and her mom (Mara Pelton) were permitted to move back in with Petitioner.

Petitioner then filed a lawsuit against the police department and city on or about November 18,

2003². Days thereafter, L.P. and her sister were removed from their home and, weeks later, yet another interview was conducted by Officer Arnoux of the Columbia Falls Police Department of L.P., and although this interview did not raise any new information and actually contradicted previous statements, criminal charges were filed on or about February 20, 2004 (Tr., at 239-47), over seven months from the date of the original report. Falla made clear that the defense did not claim L.P. was lying. In fact, she was telling the truth when she told the officer that she could not be sure whether Petitioner was awake or asleep at the time, according to Mr. Falla. For Petitioner to be guilty, the jury would have to find that he touched L.P. knowingly and consciously with intent (Tr., at 247-48). The defense said nothing about Mr. Allen in its opening statement.

During the State's case-in-chief, L.P. testified that in June or July of 2003, when she was 13, she lived with her mom, her sister, Petitioner and his son. Her mom, Mara Pelton, would drop them all off at 7:00 a.m. at Arcadia, a cards shop and book store co-owned by Petitioner and Ms. Pelton. There, Petitioner's son and L.P.'s sister would sleep while L.P. and Petitioner watched movies on the computer in the backroom. She said that in June or early July, she was lying on the couch in the backroom with Petitioner, with her back to him. She attested that Petitioner stuck an unspecified hand up her shirt and the other one down her pants. L.P. said she told him to stop and eventually pulled Petitioner's hand out of her pants. L.P. said she then got up and sat down in a chair. She then attested that Petitioner asked if she wanted to come and lay back down, but she declined (Tr., at 249-257). L.P. then attested that she "got up, got ready for school and left" (Tr., at 257), despite the fact that she had previously attested that the incident had allegedly happened during summertime, a fact again not pursued by Petitioner's counsel. She then attested that she later told her grandparents and they called the police (Tr., 258).

² The date presented at trial was not entirely accurate, in spite of insistence by Petitioner to counsel to correct it. Petitioner had initiated legal action against the Kalispell Police Department and City of Kalispell on or about October 30, 2003, with the filing of a Petition for Production of Records, though this was expanded to a full suit on or about November 18, 2003.

The prosecutor sought to illicit testimony from L.P. that Petitioner had additionally “patted” the couch in an effort to encourage L.P. to return, yet L.P. denied this had happened. In response, the prosecutor made a veiled threat against L.P. not being allowed to return home, a threat that Petitioner's counsels refused to object to in spite of his insistence.³ This statement was later edited in the transcript to state that L.P. had admitted to such and no threat to have been made, and Petitioner's efforts to obtain the original notations of the trial to be independently transcribed have been barred since.

L.P. said she talked to an officer and told him that Petitioner was awake (Tr., at 261-63). She later gave another statement, when she was accompanied by her mother, who was not supportive in L.P.'s opinion. L.P. testified that her mother brought up the fact that Petitioner could have been asleep. When interviewed by the second officer, L.P. told him that Petitioner being asleep “was a possibility” (Tr., at 263). L.P. said that Petitioner was talking to her some ten minutes before the alleged incident and after she moved to a chair, but not during the alleged incident, though his body was moving. She attested that she believed he was awake. She claimed that she told the police that it was possible Petitioner was asleep because her mom told her to⁴ (Tr., at 264-65).

On cross-examination, L.P. was asked about her statements and interviews with police. L.P. did not independently recall the details of her interviews with Officers Wilson, Overman and Arnoux (Tr., at 341-48). As for the details of the incident, L.P. confirmed that she had told a defense investigator that for about five or ten minutes before the incident, Petitioner had stopped talking to her. L.P. attested that she got up from the couch, looked back, and saw Petitioner's eyes open. During the incident, she

3 This sequence was later edited from the transcript to be replaced with an affirmation from L.P. that was never actually attested to (Tr, at 257). Though Petitioner has sought copies of the original notations from the trial to be independently transcribed, he has been barred from obtaining such.

4 As with innumerable details presented at trial, this fact was falsely presented and not challenged by Petitioner's counsel, Falla. L.P. had originally admitted to Petitioner being asleep during a counseling session approximately a week after the initial report in July, 2003, and her mother was not involved in that disclosure. Though these issues are too innumerable to incorporate herein, and were not subject of the appeal, they are nevertheless a further reflection of Falla's prejudicial influence over Petitioner's trial, and are referenced here to establish this foundation.

attested that Petitioner did not “come over the top” of her in any way or try to keep her down (Tr., at 361-63).

At the end of the first day of trial, the defense asked for leave to obtain the criminal histories of the State's witnesses, including Mr. Allen, arguing that the histories were relevant to the motive of jailhouse informants to testify. Defense counsel Stufft cited Petitioner's Sixth Amendment rights. Mr. Stufft also gave the district court the case numbers for cases in which he wished to review the PSI reports, Stufft told Judge Curtis that Mr. Allen was a sex offender who had been released from jail. Mr. Allen had violated the terms of his probation for the second and third times and in the report of violation Mr. Allen's probation officer stated that Mr. Allen lies, cannot be trusted and needs prison. As Mr. Stufft pointed out, however, Mr. Allen was on home arrest (Tr., at 293-97).

The State resisted full disclosure of a PSI report, arguing that Mr. Allen's criminal history was not relevant, as there was no proof he had been convicted of any crime dealing with dishonesty. The State further argued that the defense could only inquire into the current pending charge and there was no proof that Mr. Allen had been released pursuant to any deal (Tr., at 297-99). The district court once again reserved ruling (Id).

Defense counsel renewed its request when trial resumed the second day of trial. Mr. Stufft wanted to look at Mr. Allen's PSI report and to inquire into his criminal history to develop his motive to testify against Petitioner⁵. Defense counsel Stufft asserted that Mr. Allen's underlying crime involved sexual molestation and that Mr. Allen had a strong motivation to stay out of state prison. The district court reviewed the provisions of M.R.Evid. Rule 608(b) and yet again reserved ruling.

The district court eventually ruled that the defense would not be given access to Mr. Allen's PSI

⁵ It should be noted that absolutely no effort was expended by Falla nor Mr. Stufft prior to trial to either independently interview Mr. Allen or to make pretrial petitions for the records sought at trial.

report. The district court apparently had reviewed it and concluded that the PSI report contained no information regarding specific instances of truthfulness or untruthfulness that could be inquired into pursuant to Rule 608(b). The district court ruled that the defense could not ask Mr. Allen if he had any extra fear of prison because he was a sex offender and could not cross-examine him with regard to the underlying conviction. The court further ruled that the defense would be permitted to cross-examine Mr. Allen with regard to specific instances of untruthfulness as revealed in the Report of Violation going back to 1996 (Tr., at 384-91).

Frank Allen, Falla's former client, was then called by the State and Mr. Falla himself left the courtroom (Tr., at 392). Mr. Allen testified on direct examination that he was on probation and was facing revocation of that probation and a four-year prison term. Mr. Allen attested that he had had no discussions with the State regarding any deal (Tr., at 393). Mr. Allen said that he had met Petitioner in the county jail where they shared the same pod. He attested that about two weeks after they met, Petitioner spoke of L.P. and did so frequently, at least a couple of dozen times. Mr. Allen opined that Petitioner spoke of L.P. as an equal, that Petitioner told him that a man would have to be gay to not find L.P. attractive and that L.P. appeared mature for her age.⁶ Mr. Allen claimed that Petitioner told him that while Petitioner and L.P. were *watching television* in the backroom of Arcadia, *sitting side by side* on the couch *on one afternoon after school*, that Petitioner had put his hands up L.P.'s shirt and one hand down her pants (Tr., at 394-97). Notably, Allen's testimony contradicted L.P.'s in numerous ways, yet no objection was ever made by Petitioner's counsels. Mr. Allen also testified that Petitioner had

⁶ It should be noted that these statements were carbon-copied text from the Montana Sex Offender Treatment Program (SOP), which Mr. Allen presumably had completed at some point in time as it is required by State law. Language referring to Petitioner's finding L.P. "equal", to having to be gay to not find L.P. attractive and to L.P. being "mature" are all virtually identical to self-defenses of sex offense presented to participants in SOP counseling and offenders are encouraged to adopt such into their own treatment. Petitioner was unaware of these components himself until he participated in SOP himself, though Mr. Allen's asserting these perspectives is indicative of elements of his character and background that were deprived to Petitioner's defense by the district court's prior ruling and the ineffectiveness of Petitioner's trial counsel in preparing for such cross-examination.

given L.P. an orgasm once and that she had liked it (Tr., at 398), an issue that was never alleged by L.P.

Mr. Allen maintained that he had no deal with the State. He claimed that while he considered Petitioner a friend, he thought what Petitioner did was wrong and horrible (Tr., at 399). Mr. Allen told the jury that he had not approached the police with the information. Rather, he claimed, the Kalispell Police Department contacted him after Mr. Allen told his attorney, Falla (Tr., at 400: 21-25; 401: 1-9).

On cross-examination, Mr. Allen said that he was arrested in mid-February and gave the police a statement against Petitioner around April 13, 2005. Mr. Allen attested that he was released from jail to house arrest on June 3, 2005 (Tr., at 403-04, 420-21). Mr. Allen's dispositional hearing on his revocation had been postponed until the week following Petitioner's trial (Tr., at 421).

Mr. Allen denied being a liar and denied that he had every reason to lie in Petitioner's case (Tr., at 403-04). Mr. Allen maintained that he had been honest with his most recent probation officer and with a counselor (Tr., at 407-08). Mr. Allen admitted that he had lied to his probation officer with regard to certain conduct for which he was subsequently charged with a misdemeanor (Tr., at 407-09). Also, Mr. Allen admitted that in March, 1997, he had lied to his probation officer with regard to certain alleged violations (Tr., at 407-09, 412-14, 423-25). When asked why he had lied, Mr. Allen confessed that he had done so to avoid going back to prison (Tr., at 424-25), though again this was a point ignored by Petitioner's counsel.

Defense counsel also sought to undermine Mr. Allen's credibility by asking him about other conduct which Petitioner had supposedly admitted in Mr. Allen's presence, which Mr. Allen had attested to at length in his police statements against Petitioner. Mr. Stufft repeatedly sought to elicit the content of Petitioner's alleged statements, which Mr. Allen claimed to have overheard⁷. Each time, the prosecutor

⁷ It should be noted that Falla had made a pretrial determination to not address the allegations made by Mr. Allen regarding Petitioner's supposed relationship to Mr. Dasen's alleged prostitution ring, and Mr. Stufft complied with Falla's

objected and the district court sustained the objection. The district court finally admonished Mr. Stufft not to ask the question again (Tr., at 416-19).

Falla returned to the courtroom at the conclusion of Mr. Allen's testimony (Tr., at 426).

The State called an expert witness to discuss the adequacy of the various interviews and police techniques (Tr., at 428-78). The defense presented testimony from L.P.'s mother and from two police officers who had interviewed L.P. (Tr., at 484-500, 501-18, 519-25). The defense proposed an instruction which would tell the jury how to view and assess the testimony of the jailhouse informant, Mr. Allen. The State opposed the offered instruction and the district court refused to give it. The district court concluded that the proper statement regarding witness credibility was as contained in one of the State's instructions, which the district court gave (Tr., at 539-42).

The State repeatedly referred to Mr. Allen's testimony to bolster its case in its initial closing arguments. The prosecutor argued that L.P. was a credible witness (Tr., at 573). The prosecutor then asserted that Mr. Allen essentially corroborated L.P.'s story (Tr., at 573-75). The prosecutor summed up Mr. Allen's testimony by telling the jury that "in a totality Mr. Allen should be believed" (Tr., at 575).

The State specifically referred to and relied upon Mr. Allen's testimony in telling the jury to reject the defense that Petitioner was asleep when he touched L.P. The jury was told that Mr. Allen's testimony was a reason to reject the defense:

The defense wants you to think that all of this happened because the Defendant was sleeping. I argue to you that that is ridiculous when you hear the whole facts of this case, when you hear what [L.P.] has to tell you and you hear what Frank Allen has to say.

Tr., at 576:16-22.

Petitioner was subsequently found guilty of the offense of sexual assault and was sentenced on or

directions in this regard. As such, though Mr. Stufft made several efforts to undermine Mr. Allen's testimony with lesser contradictions regarding an alleged molestation of Petitioner's son, Mr. Stufft made no effort to challenge the entirety of Mr. Allen's statements to police, and did so at the direction of Falla.

about December 1, 2009, to serve twenty (20) years at the Montana State Prison, with fifteen (15) of those years suspended. Notice of appeal was filed in the cause in or around December, 2005, and all briefs were submitted, following extensive delays created by preparation of transcripts by the district court, to the Montana Supreme Court by November 14, 2007.

On or about July 31, 2007, the Montana Supreme Court issued a preliminary ruling wherein it ordered a new evidentiary hearing to be held on the subject of Falla's conflict of interest. A new evidentiary hearing was thereafter held by the district court on or about September 17, 2007.

At this new hearing, the background of the cause was reexamined. It was established that Falla was appointed to represent Petitioner on April 14, 2004, Mr. Van Alstine on November 29, 2004, and Mr. Allen on February 18, 2005 (September 17, 2007, Transcript, at 13-14, 22). Around February 8, 2005, Mr. Van Alstine told Falla, within the context of attorney-client privilege, that Van Alstine wanted to provide to law enforcement or the Flathead County Attorney incriminating information allegedly obtained during conversations Van Alstine claimed to have had with one or more jail inmates. Falla attested that though Van Alstine did not provide him with substance of the information or an identity, that Falla thought of Petitioner. Persons charged with sex offenses, as both Petitioner and Van Alstine were charged, were housed in the same cell block in the detention center (Evid. Tr., at 15-17, 36-37).

Van Alstine had a prior felony record. Falla attested that he assumed Van Alstine wanted to benefit himself by providing information on another inmate, and Falla acknowledged that jail inmates may be motivated to provide information against others, in exchange for getting some benefit or break in their own case (Evid. Tr., at 14-18; 52).

Falla claimed he had told Petitioner almost immediately that another inmate was providing information about him to law enforcement (Evid. Tr., at 38). Falla did not take any steps to have Petitioner moved from the cell block or isolated from Van Alstine (Evid. Tr. At19-20). Sean Hinchey,

another public defender, testified that he was asked by Falla to meet with Van Alstine, but that he was not formally appointed to represent Van Alstine (Evid. Tr., at 60, 62). This occurred around February 9, 2005 (Evid. Tr., at 20). Afterwards, Mr. Hinchey had no further involvement with Van Alstine.

Mr. Hinchey concluded, based on his discussions with Van Alstine, that “it would be a problem or conflict in my opinion for [Falla] to represent both Mr. Van Alstine and Mr. Glick if the information Mr. Van Alstine conveyed were to be used by the State” (Evid. Tr., at 60:1-5; 38). Mr. Hinchey testified that he so notified Falla within a few days of meeting with Van Alstine (Evid. Tr., at 59). Falla testified that Hinchey did not him advise him that he faced a conflict of interest until much later in the case (Evid. Tr., at 53-54).

Falla did not seek to withdraw as counsel of record for either Petitioner or Mr. Van Alstine. Falla said he decided to remain as counsel for Van Alstine, and waited to hear whether Van Alstine had anything to offer against Glick, and if so, whether the State intended to use Van Alstine and/or his information in the prosecution of Glick (Evid. Tr., at 19).

Van Alstine was interviewed by law enforcement on March 30, 2005 (Evid. Tr., at 61; 71). Falla did not dispute that in the interview Van Alstine asked the detective if Petitioner would find out that Van Alstine was providing information about Petitioner, to which the detenctive replied that there would be no way for Petitioner to know, unless they decided to use the information (Evid. Tr., at 52-53).

On February 18, 2005, Falla was appointed to represent Frank Allen in connection with a proceeding to revoke a probationary sentence. Allen previously had been convicted of a sex offense and had been incarcerated in the same cell block as Van Alstine and Petitioner (Evid. Tr., at 22-23; 64).

On March 23, 2005, Allen reportedly told Falla, within the context of attorney-client privilege, that Allen wanted to provide the county attorney with information allegedly obtained during conversations Allen claimed to have had with Petitioner. Falla attested that Allen mentioned Petitioner by name

(Evid. Tr., 233-25; 39).

Falla maintained that he told Petitioner that Allen wanted to provide information to the State about him (Evid. Tr., at 41). He withdrew from representing Allen, and the revocation case was assigned to Glen Neier (Evid. Tr., at 25; 64). Neier recalled that Falla told him that Allen had information about someone, but could not be sure if Falla mentioned Petitioner by name (Evid. Tr., at 69).

Neier met Allen on March 29 and April 6, 2005. Mr. Neier testified that he told Allen to continue to talk to Petitioner, as the more information he could get, the better it might be for his revocation proceedings. Neier characterized prison as a “real possibility” for Allen upon revocation of his sentence. Allen's probation was subject to revocation based on allegations that Allen had violated conditions by drinking. He could not get into an alcohol treatment program due to the nature of the underlying sex offense (Evid. Tr., at 65-68).

A day after he met with Allen, Neier attested that he met with Lori Adams, the prosecutor in Petitioner's case, and spoke with her about Allen and Petitioner. Neier said that Ms. Adams responded that if Allen's information was good, they would take it into account in the revocation proceeding (Evid. Tr., at 66:20-25; at 72: 13-15).

The information Allen provided was harmful to Petitioner (Evid. Tr., at 67). Allen gave a statement to law enforcement on April 13, 2005 (Evid. Tr., at 71). The State stipulated to Allen's release from custody on house arrest on June 2, 2005 (Evid. Tr., at 67).⁸

Falla, who continued to represent Van Alstine and Petitioner, attested to making inquiries of the prosecution periodically to determine if the State would use Van Alstine or Allen in Petitioner's trial, which was set to begin on July 11, 2005 (Evid. Tr., at 26). On May 10, 2005, Falla learned that Van

⁸ Allen subsequently died on or about July 22, 2005, less than two weeks after testifying at Petitioner's trial on July 12, 2005.

Alstine and Allen might be called. Falla withdrew as Van Alstine's attorney on the underlying felony charges, and Neier was appointed (Evid. Tr., at 21-22, 26). On May 23, 2005, Falla attested that he was informed by the prosecutor that Van Alstine and Allen would be called as witnesses by the State in Petitioner's trial, and that they had given statements. Falla testified that he was then provided with copies of his former clients' videotaped statements. Falla attested that he viewed these interviews and then notified Petitioner of the substance of the information Allen and Van Alstine had provided (Evid. Tr., at 26-28).

Petitioner testified that he first learned that any inmate had even sought to provide information against him, let alone the substance or content of that information, during a telephone call with Falla on May 25, 2005. He learned the identities of the inmates a couple of days later. Petitioner was able to view the videotaped statements of Van Alstine and Allen, and to review transcripts of the interviews (Evid. Tr., at 75-77).

Petitioner said he would have sought separation or to be removed from other inmates had he known prior to May 25 that either Van Alstine or Allen were providing information or assistance to the prosecution concerning him. Petitioner attested that in fact he had requested separation from another inmate in the medical block after he learned that that inmate had gone through some of Petitioner's papers, and attempted to use information on his own behalf.

The trial court thereafter issued an order with findings of fact and conclusions of law reaffirming its earlier decision that Falla had no conflict of interest. Subsequently, this Court affirmed the conviction on appeal on or about February 19, 2009, the day after being released from State prison, though the Court failed to address in its decision the majority of the issues raised upon appeal. Petitioner sought to have his counsel, William Hooks, seek a motion for reconsideration, yet said counsel delayed his decision before ultimately declining to do so. Petitioner thereafter filed his own motion for

reconsideration, yet was barred from filing such by this Court.

Upon release from prison, Petitioner was remanded to the custody of the Montana Department of Corrections to serve a fifteen (15) year probation sentence to run simultaneously with Petitioner's suspended fifteen (15) year sentence. However, there was no actual commitment to probation within Petitioner's sentencing order, and as such, he was remanded to such custody without lawful authority.

Since being placed upon probation, Petitioner's probation officer, Dave Edwards, has already sought to revoke him once upon meritless grounds once, incarcerating Petitioner for six weeks, unconstitutionally seized and kept for nearly two months a laptop in Petitioner's possession, and, when revocation could not be accomplished under existing conditions and Petitioner would not voluntarily sign to increased restrictions that would bar him from medically prescribed therapy, sought after modifications of Petitioner's sentence to impose such broad and rigid conditions as to make it impossible for Petitioner to leave his home without fear of revocation, specifically to prohibit him from going to any "place or function where children are present or reasonably expected to be present...", which constitutes any place within a community, and a restriction upon his freedom of expression to name his alleged victim, L.P., in any form of discussion or publication, including on the Internet. Said conditions are so vague and overly broad that Petitioner could literally be revoked for walking on a sidewalk if Edwards were so inclined, since there is a reasonable expectation that children could be present anywhere in a public environment, or mentioning L.P. in a chat room. Said modifications were approved and imposed by the district court on or about February 18, 2010, literally confining Petitioner to his 6' by 10' room without consent to leave is granted by Edwards, and were additionally expanded upon to bar Petitioner from contact with any member of L.P.'s family, with the district fully conscious that Petitioner had a pending lawsuit against L.P.'s mother for business and personal assets.

In the instant case, probation has not been used as a means of supervision and reformation, but

instead has been used as an instrument of harassment and intimidation against Petitioner, leaving him in constant fear of further abuses of further such from Respondent and its representatives. Liberties and entitlements reserved for other probationees are denied to him and Edwards has made it clear that he intends to return Petitioner to prison as soon as a means by which to accomplish such can be achieved. In the interim, Petitioner is left with little choice but to remain confined in inhumane conditions within a six by ten foot room or risk Edwards seeking revocation for what would otherwise be extreme and irrational reasons.

In effect, Petitioner is constrained in multiple areas in violation of his constitutional liberties, has been so detained through deprivation of his constitutional rights, and as such he is entitled to be released from custody, and his constitutional rights restored in full, without delay.

SUMMARY OF ARGUMENT

The State's theory at trial was that L.P. told the truth about being touched. The defense theory, presented by counsel had repeatedly tried to remove, was that while L.P. may have been touched, Petitioner was asleep when he did so. Thus, the critical fact issue was whether the State could prove, beyond a reasonable doubt, that Petitioner was awake at the relevant time. Mr. Allen, a jail inmate, was the State's key witness in this regard. Falla, who represented Mr. Allen concurrently with his representation of Petitioner, and who had to withdraw as Mr. Allen's attorney when Mr. Allen decided to provide allegedly incriminating evidence against Petitioner to the State and even left the courtroom during trial to forego question of conflict, had an impermissible conflict of interest which should have disqualified him from representing Petitioner. Petitioner was denied his state and federal constitutional right to effective assistance of counsel, since to be effective, counsel had to have no conflict.

Further, Petitioner was denied his constitutional right to effective assistance of counsel when the district court erred in failing to appoint new counsel to represent Petitioner at hearings upon the merit

of his claims against Falla's providing ineffective assistance of counsel. Since Petitioner was left to defend himself against his own counsel, he was effectively without representation and his state and federal constitutional rights were violated at this critical stage. The district court erred in not providing Petitioner with counsel at such hearings, and additionally erred in failing to remove Falla and to appoint substitute counsel.

Still further, Petitioner's constitutional right to confront witnesses against him was violated when the district court impermissibly limited counsel's ability to pursue evidence and to cross examine Allen at trial.

On the basis of the foregoing, Petitioner's conviction was obtained upon unconstitutional grounds. As such, Petitioner's conviction should be dismissed and Petitioner should be released from unlawful custody.

Additional to the foregoing, Petitioner was never sentenced to a probationary sentence, and its imposition upon him is in violation of his constitutional liberty interests. In absence of a specific order compelling Petitioner to be detained, the State of Montana has no authority to confine him.

Further still, the sentencing court had no justification, six years after imposing its sentence, to modify the conditions of sentence by imposing additional civil liberty restrictions upon Petitioner absent any violations of probation or disciplinary reports on the part of Petitioner. Still further, imposition of such further restraints violate Petitioners freedom of expression, and prohibitions against cruel and unusual punishments.

On the basis of these preceding issues, Petitioner's custody pursuant to unlawfully imposed probationary conditions is unconstitutional and Petitioner should be released from such custody without delay.

ARGUMENT

Plaintiff has been confined now for over six years upon unconstitutional grounds and is entitled to be released from such unlawful restraint, and to wit:

I. Petitioner was denied his state and federal constitutional right to effective assistance of counsel, and this error warrants reversal and release from custody.

Defense counsel labored under an impermissible conflict of interest and Petitioner was denied his right to effective assistance of counsel, since an accused person has a constitutional right to conflict-free representation. A defendant's right to assistance of counsel is guaranteed by Article II, § 24 of the Montana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. The right to counsel means the right to effective assistance of counsel (*Strickland v. Washington*, 466 US 668, 686, 104 Sct 2052, 80 Ld2d 674 (1984); *State v. Rogers*, 2001 MT 165, ¶ 7, 306 Mont. 130, 32 P2d 724 (2001)). The right to counsel afforded by Article II, § 24 of the Montana Constitution is broader than the rights afforded by the United States Constitution (*State v. Garcia*, 2003 MT 211, ¶ 37, 317 Mont 73, 75 P3d 313 (2003)). The proper method to challenge the effectiveness of counsel at trial or on appeal is in a petition for writ of habeas corpus (*US v. Espino*, 317 F3d 788 (8th Cir., 2003)).

The constitutional guarantee of effective assistance of counsel establishes two correlative rights: (1) the right to reasonably competent counsel; and (2) the right to counsel's undivided loyalty (*Wood v. Georgia*, 450 US 261, 271, 101 Sct 1097, 67 Ld2d 220 (1981); *State v. Wereman*, 273 Mont 245, 248-49, 902 P2d 1009, 1011 (1995)).

Various standards have been developed to guide inquiry into an alleged conflict of interest. In one line of cases, the United States Supreme Court has looked to whether an objection to a conflict was made, and whether the trial court should have or did inquire into the potential conflict of interest. In *Holloway v. Arkansas* (435 US 475, 98 Sct 1173, 55 Ld2d 426 (1978)), the High Court concluded that reversal is automatic whenever a trial court improperly requires joint representation over timely

objection (435 US at 488). In *Mickens v. Taylor* (535 US 162, 168, 122 Sct 1237, 152 Led2d 291 (2002)), the Supreme Court made clear that *Hollaway's* mandate of automatic reversal applied only to situations where a defense counsel had objected to the multiple representation of co-defendants and the trial court did not conduct an inquiry concerning this potential conflict.

The issue of multiple representation causing a conflict of interest also arises in *Cuyler v. Sullivan* (466 US 335, 100 Sct 1798, 64 Led2d 333 (1980)). However, the possible conflict of interest was not brought to the trial court's attention. The High Court held that in order to establish a violation of the Sixth Amendment, a defendant who raised objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance (*Cuyler*, 446 US at 348).

This Court has applied the *Cuyler* standard in a variety of situations. In *State v. Christenson* (250 Mont. 351, 820 P2nd 1303 (1991)), this Court applied the *Cuyler* test in a case in which the defendant was convicted and his attorney charged with crimes similar to or related to those of his client. If a defendant establishes both elements of the test, this Court will presume that s/he was prejudiced by the conflict (*Id*). In those circumstances, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties" (*State v. Jones*, 278 Mont. 121, 923 P3d 560 (1996), quoting *Strickland v. Washington*, 466 US at 692).

Cuyler and/or *Christenson* were subsequently applied in *State v. Wereman* (*supra*); *State v. Finley* (276 Mont. 126, 915 P2d 208 (1996)); *State v. Borchert* (281 Mont 320, 934 P2d 170 (1997)); *State v. Deshon* (2002 MT 16, ¶¶ 15021, 308 Mont. 175, 40 P3d 391 (2002) (defense counsel represented a key defense witness during Deshon's trial and so informed the trial court)); and *Kills on Top v. State*, 2000 MT 340, ¶¶ 42-49, 303 Mont. 164, 15 P3d 422 (2000)).

In the instant case, Falla had an impermissible conflict of interest and the trial court erred in not removing him. Petitioner's constitutional rights were violated and he has been unlawfully detained as

direct consequence. The trial court did not articulate or apply any specific test regarding the issue of Falla's conflict of interest. Rather, the court based its rulings in part of what it deemed to be a lack of evidence or proof offered by Petitioner. The ruling was clearly incorrect.

Here, the impermissible conflict of interest was established by Falla's own factual narrative. For over two months, Falla represented both Petitioner and Van Alstine. For over one month, he represented both Petitioner and Allen. Falla knew, because both clients told him, that they purported to have incriminating information against Petitioner. By the time of Petitioner's trial, Allen's case was still pending, and in fact had been specifically delayed to be addressed after Petitioner's trial. Facts relating to Allen's underlying convictions were sought by the defense for use against Petitioner at his trial. There was no waiver of any possible conflict offered either by Allen, Van Alstine nor Petitioner. The district court did not ask if Petitioner would waive his conflict either, and he clearly did not.

Numerous state courts have found a conflict of interest which required removal of counsel on similar facts. The court in *People v. Reyes* (728 P2d 349, Colo. App. (1986)) affirmed a trial court order disqualifying defense counsel. There, a defense investigator interviewed a man named Montoya to determine his eligibility for public defender representation in an unrelated case. Montoya later was interviewed by the prosecution, and gave statements which were damaging to Reye's case. The prosecution moved to disqualify the public defender, and the trial court granted the order. The appellate court agreed with the lower court's conclusion "that the public defender's prior representation of a prosecution witness whose credibility was to be at issue in defendant's trial and the public defender's present representation of defendant created a conflict of interest" (728 P2d at 352). The court recognized the valid concern that the public defender's representation and duty to cross-examine and attempt to impeach Montoya as a state's witness "might affect the 'fairness or appearance of fairness at trial'" (Id).

In *Petition of Hoang* (781 P2d 731 (Kan. 1989)), the public defender agency represented Hoang, and had represented another person who was a key prosecution witness against Hoang (781 P.3d at 732). The trial court concluded that defense counsel for Hoang had a conflict of interest, and the appellate court affirmed. A concern for the attorney-client privilege held by the former client-turned-witness animated the court's discussion. The court presumed "the witness/former client reposed confidences in his attorney by virtue of their relationship" (781 P2d at 734). Thus,

[e]ven if the attorney is not actively representing the witness, '[t]he attorney's duty to preserve the confidences of [the witness-client] does not end when the attorney-client relationship ends. The attorney continues to be obligated to protect his former client's privileged communications until he is released from the duty [by the witness-client's consent or as otherwise provided by the Model Rules of Professional Conduct.]' (781 P2d at 735 (citations omitted))

Similarly, in *King v. State* (810 P.2d 119 (Wyo. 1991)) a public defender made arrangements to get one Thompson out of jail after her arrest. Other attorneys later represented Thompson and arranged for a plea deal. Thompson subsequently became the key witness against King, and the public defender who helped Thompson initially became King's attorney. King asked the court to appoint a new attorney, and the court refused to do so. The appellate court reversed King's conviction. Because King objected at trial, the court reviewed for abuse of discretion, noting that "'the right to effective assistance of counsel has been violated when a lawyer represented both a defendant and the chief prosecution witness'" (810 P2d at 123 (citations omitted)).

The same attorney represented two inmates who shared a cell in *Coleman v. State* (846 P.2d 276 (Nev. 1993)). One client, Coleman, allegedly made incriminating comments to the other, Acklin, who told his attorney. The attorney arranged for Acklin to speak with law enforcement. The court expressed "no doubt that an actual conflict existed in the case at hand." (846 P3d at 277).

More recently, in *United States v. Oberoi* (331 F3d 44 (2nd Cir. 2003)), the federal defender's office represented Kaid in a narcotics prosecution. The defender later was appointed to represent Oberoi on

fraud charges unrelated to the charges against Kaid. However, the government later identified Kaid as a witness against Oberoi on the fraud charge. The defender's office moved to withdraw from Oberoi's case on the ground of conflict of interest. The appellate court vacated the lower court's order, finding that the circumstances "created a substantial danger that the proceedings in both cases would not 'appear fair to all who observe them'" (331 F.3d at 52).

The trial court's appointment of Stufft as co-counsel did not remedy the conflict of interest. This solution to a conflict was rejected by the court in *United States v. Cheshire* (707 F.Supp 235, 240 (D.La. 1989)) which "view[ed] it as an almost impossible task for a lawyer to participate throughout the course of a trial but not suggest a single question or style for cross examination of the most important witness against his present client." This same "solution" also was rejected in *FMC Techs., Inc. v. Edwards* (420 F. Supp. 2D 1153, 1162 (D. Wash. 2006)). The Court held that a law firm, Newman & Newman, could not avoid a conflict by retaining a separate lawfirm to cross-examine the firm's former client, Wattles. "Having another lawyer cross-examine Mr. Wattles does not eliminate the conflict or address the loyalty issues raised by Newman & Newman presenting a case to this Court that centers on discrediting Mr. Wattles."

In sum, the trial court erred in concluding that Falla did not have a conflict of interest. If this Court is to apply in its resolution one of the typical standards for conflicts, this case is akin to *Holloway*, and dissimilar to *Cuyler*, in that the conflict was brought to the court's attention, although counsel maintained he did not have a conflict, and the accused vigorously sought counsel's immediate removal. In the presence of innumerably similar situations, there was no credible dispute that conflict of interest existed. As there was a conflict of interest, prejudice should be presumed, and the conviction reversed.

The Court's resolution of a conflict of interest situation in *Borchert* (*supra*) supports Petitioner's argument. Borchert argued on appeal that he had been denied effective assistance of counsel due to a

conflict of interest, because his counsel previously represented Bakeberg, a co-defendant, at Bakeberg's detention hearing, creating an attorney-client relationship with him. Bakeberg entered a plea agreement right before trial, and cooperated with the state against Borchert. The State argued that Borchert could not meet the *Christenson* test. This Court reversed Borchert's conviction on other grounds, but nonetheless directed a resolution which implicitly recognized the existence of a conflict of interest. "[O]ur resolution of this issue is embodied in the following directive: at Borchert's retrial, if Borchert waives, on the record, the alleged conflict of interest, his present counsel may continue to represent him; if, however, Borchert refuses to waive the conflict, and he and his present counsel are unwilling to continue the representation, the court must appoint new counsel for Borchert" (*Borchert*, 281 Mont at 327-328, 934 P2d at 175).

Co-counsel Stufft knew that Allen had been convicted⁹, but he could not pursue his line of cross-examination, and thereby to urge the jury to reject Allen's testimony. Falla knew this information, but could not provide it to Petitioner's defense due to his cross-loyalty between Petitioner and Allen. Falla could not provide information against Allen without violating his attorney-client privilege and this rendered his counsel ineffective by default. This divided loyalty is at the heart of the conflict of interest issue.

The denial of a criminal defendant's Sixth Amendment right to counsel is prejudicial per se. (*Bell v. Hill*, 190 F.3d 1089, 1091 (9th Cir. 1999)). This violation constitutes structural error. (*United States v. Gonzalez-Lopez*, __ U.S.__, 126 S. Ct. 2557, 2564, 165 L.Ed.2d 409 (2006)). When a defendant or defense counsel makes a timely objection to joint representation based on an asserted conflict of interest and the trial court fails to inquire as to whether the conflict warrants the appointment of

⁹ In fact, Allen had been convicted of sexual assault in 1993, and then a subsequent probation violation upon the sentence thereof in 2000, through Cause No. DC-91-057B, Eleventh Judicial District of Montana.

separate counsel, or fails to take adequate steps, prejudice is presumed and reversal is automatic (*Holloway*; *McFarland v. Yukins*, 356 F3d 688, 700, 702-704 (6th Cir., 2004)¹⁰).

If no objection is made, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance (*Cuyler*, 446 US at 348). If this standard is satisfied, the defendant need not show prejudice (*Cuyler*, 446 US at 349; *Hall v. United States*, 371 F3d 969, 973 (7th Cir., 2004) (“Proceeding under [*Cuyler v.*] *Sullivan* places a 'lighter burden' on the defendant than *Strickland* because demonstrating an 'adverse effect' is significantly easier than showing 'prejudice.'”)).

This Court applied *Cuyler* in *Christenson* (250 Mont at 355), 820 P2d at 1306), holding that “a defendant must show: (1) that counsel actively represented conflicting interests, and (2) that an actual conflict of interest adversely affected counsel's performance.” This test was reiterated in *Deschon*.

However, *Cuyler* did not state the test in these two parts. *Cuyler* involved a situation in which three defendants were tried separately, represented by the same counsel. The Court concluded that in the absence of any objection, the mere possibility of conflict was insufficient. A defendant “who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief[;]” but until the defendant “shows that his counsel actively represented conflicting interests, he had not established the constitutional predicate for his claim of ineffective assistance” (446 US at 349-50). Thus, the defendant must show that counsel had an actual conflict.

Further, the *Cuyler* standard “is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance” (*Mickens v. Taylor*, 535 US 162,

10 Citing cases, the *McFarland* Court noted it had interpreted *Holloway* to apply when either the defendant or defense counsel made a time objection; “[i]t makes little sense to deny effect to the objection of the defendant where his counsel was negligent or worse in tolerating a conflict of interest”(356 F3d at 702, n. 4).

172, n. 5, 122 SCt 1237, 152 Led2d 291 (2002)).

Cuyler should not be read as holding that a conflict of interest may arise only in cases of multiple, concurrent representation. It is clear that successive representation, in which counsel has previously represented one who is adverse to counsel's current client, may also rise to an actual conflict of interest (*Alberni v. McDaniel*, 458 F3d 860, 872 (9th Cir., 2006); *Lewis v. Mayle*, 391 Fed 989 (9th Cir., 2004)). This Court has applied *Cuyler* in a variety of situations, apart from cases of multiple representation.¹¹ It would therefore be inappropriate to apply the *Strickland* standard and require Petitioner to prove prejudice for pre-trial proceedings.

The district court did not apply any standard when it first held that Falla did not have a conflict of interest. Following the evidentiary hearing, the court purported to apply *Cuyler*, and ruled against Petitioner.¹² *Holloway* however provides the more appropriate standard. Petitioner clearly objected to Falla's continued representation, based on the belief that Falla was burdened by a conflict. Although Falla did not represent multiple parties at the time of trial, as was the case in *Holloway*, the factual and procedural contexts were consistent with the *Holloway* standard.

Under either standard, Falla had a indisputable conflict. In its decision, the district court first held that Falla did not have conflicting interests when he represented Petitioner, Van Alstine and Allen, because the charges were unrelated, that “potential” conflicts arose at the time when Van Alstine and Allen stated they wanted to provide incriminating information against Petitioner, and that these did not ripen into “actual” conflicts because Falla withdrew in each case (Conclusions of Law, Paragraphs 5,

¹¹ See *Wereman; Kills on Top*, Paragraphs 45-52; *Borchert* (successive representation); *Thurston v. State*, 2004 MT 142, Paragraphs 16-20, 321 Mont 411, 91 P3d 1259 (2004) (alleged conflict because counsel formerly worked for the county attorney's office); *Hendricks v. State*, 2006 MT 22, Paragraphs 12-19, 331 Mont 47, 128 P3d 1017 (2006) (defense counsel formerly prosecuted the defendant, and also served as city prosecutor); *State v. Smecker*, 2006 MT 177, Paragraphs 23-27, 332 Mont 221, 136 P3d 543 (retained counsel's partner joined the county attorney's staff during the pretrial phase).

¹² The district court cited *Deschon*, which applied the *Cuyler* standard. However, the *Mickens* opinion was filed after this Court's decision in *Deschon*.

6).

These conclusions are incorrect. First, a lack of similarity between the cases is not determinative. “In successive representation cases, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties” (*Mannhalt v. Reed*, 847 F2d 576, 580 (9th Cir., 1988) See also, *United States v. Infante*, 404 F3d 376, 392 (5th Cir., 2005) (“A conflict [of interest] exists when defense counsel places himself in a position conducive to divided loyalties.”)).

Falla clearly had an actual conflict the moment he had reason to believe that one client was seeking to cooperate with law enforcement by providing incriminating information against another client. Additionally, once one client expressed the desire to become involved in the prosecution of another client for sake of potential benefit in his own defense, the two cases are no longer dissimilar, since the first client's case can be affected by participation in the case of the second client. Falla put the process in motion by acting upon his Van Alstine's and Allen's wishes to act against Petitioner, telling Hinchey and Neier that the inmates wanted to provide information. In both case, Falla, while representing Petitioner, helped channel information which would help Van Alstine and Allen, while clearly harming Petitioner's interests. In Allen's case, this manifested as actual harm against Petitioner, as Allen became a critical witness for the prosecution. Had the State called Van Alstine as a witness at Petitioner's trial, Falla could not have cross-examined him, either. Falla certainly could not have cross-examined Allen, nor argued against Allen, at Petitioner's trial, and in fact Falla withdrew from all aspects of the case involving his former client upon reaching trial.

The district court emphasized the fact that Falla did not determine the substance of the information that either Allen or Van Alstine provided to law enforcement (Conclusions, Paragraphs 5, 6). In other words, the court concluded that counsel had a duty to not divulge confidential information, and since

Falla was not told, in confidence, what information Van Alstine and Allen claimed to possess, he had no duty to them, and as there were no conflicting duties, Falla did not have conflicting interests. This conclusion ignores the reality of the circumstances entirely. While Falla claimed to not know the specifics of the information, he knew that Allen and Van Alstine were motivated to help themselves, were working against his other client, and that the information, if believed, would harm Petitioner's case. In essence, Falla knew of a risk to Petitioner, to whom he owed a duty to protect, and chose in favor of two other clients to forego his loyalty to Petitioner and maintain the confidence of Allen's and Van Alstine's attempts to cause harm to Petitioner's case. Falla was told by Hinchey that he had a conflict in representing both Van Alstine and Petitioner, and Falla himself perceived a conflict sufficient to withdraw as Allen's counsel. The constitutionally mandated duty of loyalty to an attorney's clients means more than this.

Falla had an actual conflict of interest at the time his filed his motion, regardless of his opinion to the contrary.¹³ The issue becomes whether the conflict was sufficiently alleviated by Stufft's appointment as co-counsel. It must be borne in mind that Falla asked that co-counsel be appointed to handle communication with Petitioner and to cross-examine his former clients. The court ruled that Falla had no conflict of interest. Therefore, the court did not appoint Stufft for the purpose of remedying a conflict (*Cf.* Conclusions of Law, Paragraph 7). Even so, Stufft's participation was not enough to remedy the harm. (See, *United States v. Williams*, 81 F3d 1321, 1325 (4th Cir., 1996)(counsel's clear conflict of interest, in representing the defendant and his wife, who was expected to testify against him, could not "so surely have been avoided by the device of retaining auxiliary counsel for the special

¹³ "The existence of a conflict of interest cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict....'Human self-perception regarding ones own motives for particular actions in difficult circumstances is too faulty to be relied on, even if the individual reporting is telling the truth as he perceives it'" (*Lewis v Mayle*, 391 F3d 989, 998 (9th Cir., 2004)(citations omitted)).

purpose of cross-examining” the witness. “Significant, unavoidable risks would have remained.”).

Allen proved to be a crucial witness for the State. He testified that Petitioner essentially had confessed to the crime for which he was charged. Allen's testimony was offered to support the complainant's testimony, and undermine the defenses theory presented by Falla, and which Falla could not directly become involved in countering. Clearly, Allen's credibility was critical. At trial, Allen denied that his testimony was in exchange for a deal with the State, and claimed to be motivated by his belief that what Petitioner had done was wrong (Trial Tr., at 399-400), even though Neier later attested at the evidentiary hearing that the prosecutor, Lori Adams, had said they would take Allen's testimony into consideration at his revocation hearing (Evid. Tr., at 66: 20-25; at 72: 13-15). There was clear motivation besides altruism at work with Allen's motivations, yet the defense's best source of information to impeach Allen, Falla, was prohibited from doing so by his inherent conflict in not cross-examining his former client or offering any information that could be used to defend Petitioner against Allen's testimony.

Allen admitted that he had not initiated contact with law enforcement, as well. When the prosecutor asked how the Kalispell Police Department (KPD) knew that he had information to share, Allen responded:

Allen: My original attorney was Mr. Falla, and I had mentioned in a kind of off-the-wall way--

Prosecutor: I guess just to cut you off, do you know specifically how the information got to KPD?

Allen: I believe my current attorney now reported it. I'm kind – I'm pretty sure about that.

(Trial Tr., at 401: 1-9).

Allen's motivations for testifying against Petitioner would reflect on Allen's credibility. Stuffed could not respond by calling Falla as a witness, or even consult with him, because the context in which Allen told Falla he wanted to provide information against Petitioner was privileged. Allen had not waived the

privilege, as the prosecutor cut him off before Allen could relate the substance of his discussion with Falla. And even had Stufft called Falla, the jury would have observed Petitioner's two attorneys acting at cross purposes regarding the credibility of two persons whom Falla had represented. In sum, Falla had an actual, indisputable conflict, which adversely affected the defense, and this conflict deprived Petitioner of his constitutionally protected right to effective assistance of counsel.

Further, Petitioner asked the district court to appoint new counsel, due to Falla's conflict of interest, and told the court he could no longer trust Falla. As Petitioner testified, when he sent his June 3, 2005, letter to the court, he had only recently learned that two of Falla's other clients had cooperated by implicating Petitioner, and the facts support his representation.

As the district court noted, Petitioner filed numerous documents in which he complained about Falla (Finding at Fact 29). If Falla really did tell Petitioner in early February that he also represented another inmate in the cell block (Van Alstine) who was giving harmful information to the State, Petitioner would have complained about Falla immediately. Moreover, Petitioner would have sought separation from this inmate, as he did later on, when he had trouble with another inmate (Kelly Wickham) reading his paperwork and trying to approach the State to testify. The same results would have occurred if Falla had told Petitioner in March that a second inmate (Allen), whom Falla also represented, was doing the same thing. Irregardless, at the very least, Falla owed an obligation to protect Petitioner from his other clients, yet made no effort to remove Petitioner from contact therewith, suggesting that Falla took no action whatsoever to protect Petitioner, much less inform him of potential threats.

Simply put, Petitioner's pattern of conduct was well-established when faced with conflicts of this nature, and yet the record is completely without mention of Petitioner raising objection prior to his June 3, letter.

Moreover, Van Alstine asked the detective in late March if Petitioner would find out he was giving a

statement against Petitioner, and he was assured that Petitioner would not know unless the police decided to use Van Alstine's information. By then, seven weeks had passed since Van Alstine had talked to Falla about Petitioner. Van Alstine's belief that Petitioner was unaware of what Van Alstine was doing supports Petitioner's statement that he did not learn anything until late May, 2005.

Later still, Neier told Allen to “cozy up” to Petitioner to get more information to help Allen's case. It would be highly doubtful that Allen could get any information in April, if Falla had told Petitioner in March that Allen was providing information to the authorities against him.

As a matter of fact, every piece of evidence offered at the evidentiary hearing contradicted Falla's testimony, including his own earlier testimony made to the court in his June, 2005, motion, wherein he informed the court that he only informed Petitioner in May, 2005. Hinchey's and Neier's testimony contradicted Falla's sworn testimony and collaborated Petitioner's own testimony made at the hearing. Finally, Falla did not dispute Van Alstine's statements to the police, which also directly contradicted Falla's sworn testimony that he had informed Petitioner in February of Van Alstine's intentions. And yet, in spite of all of this, the district court determined that Falla was telling the truth and found in his favor. This conclusion is clearly without merit and not based upon the facts presented at the hearing.

As an alternative argument, the trial court erred in denying Petitioner's request for appointment of new counsel, prior to the time when Petitioner was informed of Falla's conflict. The refusal to appoint new counsel, and to ensure that the inquiry was not conducted in such a manner as to deny Petitioner his right to conflict-free counsel at that inquiry, warrant reversal and release from custody.

Additionally, the district court erred in refusing to appoint new counsel for Petitioner, and the error warrants reversal and release from custody. A district court must make an adequate initial inquiry into the nature of a defendant's complaint when presented with allegations of ineffective assistance of counsel to determine if those complaints are “seemingly substantial” (*State v. Kellames*, 2002 MT 41,

22, 308 Mont. 347, 43 P.3d 293). If a defendant's complaint about his relationship with counsel rises to the level of being “seemingly substantial” and he requests that the court appoint substitute counsel, the court should conduct a hearing to address the merits of the defendant's claims and the request for substitution of counsel (*Gazda*, 2003 MT 350, ¶ 29). The threshold issue to determine whether a complaint is substantial is not whether counsel was ineffective, but rather whether the district court made an adequate inquiry into the defendant's claim (*Gazda*, 2003 MT 350, ¶ 3).

New counsel should be appointed if the court determines that the defendant and his counsel “have a conflict so great that it results in a total lack of communication or if counsel is failing to render effective assistance” (*State v. Zackuse*, 250 Mont. 385, 833 P.2d 142 (1991); *State v. Gallagher*, 1998 MT 70, 24, 288 Mont. 180, 955 P.2d 1371). “A complete breakdown in communications between a defendant and his lawyer may be considered a conflict of interest” (*United States v. McVeigh*, 187 F.Supp.2d 1137, 1150 (D.Colo. 2000), citing *Romero v. Furlong*, 215 F.3d 1107, 1113 (10th Cir. 2000)).

This point was well established throughout the record, attested to by both Petitioner and Falla on multiple occasions. Petitioner's and Falla's relationship deteriorated to the point at which neither would speak to the other. Petitioner initially had problems with Falla, as noted in his June, 2004 letter. He and Falla worked out their problems. The relationship worsened, however, so that by the time Falla returned from his October vacation, Petitioner sought new counsel. Petitioner agreed to speak with Falla in November, to try and work things out, but it was to no avail. Petitioner told the judge that his problems with Falla were irreconcilable. Falla, for his part, eventually told the judge that he wanted co-counsel to handle all communications with Petitioner. On these facts, and with all the problems experienced between the two, the court erred and abused its discretion in denying the request for new counsel.

On appeal, the State misunderstood the contention that he was entitled to have the effective assistance of counsel at the hearing on whether to remove Falla as appointed counsel prior to the developments

surrounding Falla's representations of Van Alstine, Allen and Petitioner. Despite the State's insistence, Petitioner did not seek to overturn *Gazda*. Rather, Petitioner relied on facts which distinguish this case from the scenario addressed by the Court in *Gazda*. The fact is that in Petitioner's case, he was actively opposed by the prosecutor, the court itself and by his own counsel, who not only specifically testified *against* Petitioner as to why he felt Petitioner's contentions were wrong, but also complained of the problems caused by his client.

To summarize, the prosecutor at the hearing addressed and discounted specific allegations Petitioner had raised (11/29/94 Tr., at 6-20). When his turn came, Falla told the district court that he would “respond top the allegations” (11/29 Tr., at 20). He first told the judge how difficult he found Petitioner to be, and gave a number of reasons. Falla stated that having explained to Petitioner how felony prosecutions were handled, and the basis on which leave to file an Information was granted, Petitioner did not accept the explanation, and that this was “symptomatic of the way [Petitioner] looks at things” (Id, at 21).

Falla went on to offer a number of concrete examples to demonstrate how difficult he felt Petitioner was making things. Falla exhibited on a table some of the correspondence he had received from his client. He made sure to let the court know the letters were single-spaced, written front and back, on paper 8 ½ by 14 inches in size. This made it “very very difficult to focus on what I think we need to be doing, and to try to keep his – his focus on the case and what we need ti be doing in the case” (Id, at 21-22; See also 11/29.04 Tr., at 36-37).

Next, Falla called the court's attention to actions he said his client had taken without Falla's knowledge. Falla introduced a letter Petitioner received from the attorney general, in response to a letter Petitioner had written (Id, at 22). Falla introduced two more exhibits, which were letters Petitioner had written to the sheriff (Id, at 23-24). “He – [Petitioner], that is – will do this, will take

action without my knowing it, without my consent, without my being able to properly advise him” (Id, at 23). Falla brought these to the court's attention as an example of how difficult it was for him to properly communicate and to give advice to Petitioner (Id, at 25).

Falla detailed “three examples” of “difficulties I have trying to help [Petitioner]” (Id, at 30). He said the first was a correspondence Petitioner has sent to the attorney of Mara Pelton, L.P.'s mother (Id, at 30-32). The second had to do with whether Petitioner wanted Falla to pursue a bond reduction motion. Falla informed the court that, in essence, he felt Petitioner was dishonest with the court on this point. Noting that Petitioner had mentioned in an earlier hearing that he felt his bond was excessive, Falla told the court that Petitioner had informed him at one point that he wanted to withdraw a bond reduction motion, and that Petitioner had not advised Falla to the contrary in the interim. “What we hear instead from [Petitioner] is that one of his complaints against me is that the bond is excessive” (Id, at 32-33). Falla rebutted allegations about dilatory discovery practices (Id, at 37-40), and said that part of the problem in locating and interviewing witnesses named by Petitioner was that the information was too sketchy to find them (Id, at 41-42).

Petitioner then responded to the prosecutor's and Falla's representations (Id, at 43-64). The prosecutor then rebutted Petitioner's statements with two more exhibits (11/29 Tr., at 65-68), and Falla weighed in with additional grounds rebutting Petitioner's assertions (Id, at 68-78).

All of the preceding occurred without benefit to Petitioner of counsel's assistance. The only counsel on record for Petitioner was Falla, who could in no way be seen as defending his client at the hearings. This was an adversarial hearing, in which Petitioner was opposed by the court, the prosecutor, as representative of the State, and by Petitioner's own appointed counsel. It is on this footing that distinguishes *Gazda*. The accused and his attorney clearly had a conflict, and Petitioner was not represented or assisted by counsel in any conceivable context at these hearings. His right to counsel, as

guaranteed by the Sixth and Fourteenth Amendments and Article II, Section 24 of the Montana Constitution, were blatantly violated.

Irregardless of all of the foregoing, Petitioner was denied his right to the assistance of counsel unencumbered by a conflict of interest at the hearing on Petitioner's motions for appointment of new counsel, and these errors warrant reversal and release from custody. The very concept of a challenge against an attorney's representation in which the attorney is called upon to testify against his client creates an inherent conflict of interest in and of itself.

The right to counsel free of any conflict of interest attaches at all critical stages of a criminal prosecution (*United States v. Wade*, 388 US 218, 224-25, 87 SCt 1926, 18 LEd2d 1149 (1967)); *Ranta v. State*, 1998 MT 95, 288 Mont 391, 958 P2d 670). This Court has defined a "critical stage" "as 'any step of the proceeding where there is potential for substantial prejudice to the defendant'" (*Ranta*, 1998 MT 95, ¶ 17, citing *State v. Finley*, 276 Mont., at 144-45, 915 P2d at 220). In *Bell v. Cone* (535 US 685, 696, 122 SCt 1843, 152 LEd2d 914 (2002)), the Supreme Court defined a critical stage as "a step of a criminal proceeding,... , that [holds] significant consequences for the accused."

The hearings on Petitioner's motion to appoint new counsel constituted a critical stage, during which Petitioner should have been represented by counsel. Here, the district court indicated in its final Findings and Conclusions of the first hearings on Petitioner's efforts to replace counsel that it considered its inquiry into *Gazda's* request to have constituted only the initial stage of the two-part inquiry. This Court's prior decisions would suggest that Petitioner had no right to have new counsel appointed to represent him, at that hearing. However, the trial court's reference to the initial stage is a matter of semantics, not substance. It is clear from the record of the hearings, and from that court's own findings, that the court's focus in the inquiry was on the merits of Petitioner's assertions that Falla was providing ineffective assistance. At these hearings, Petitioner was confronted not only by his own

counsel, who took a position antagonistic to his client, but Petitioner also was confronted by the prosecutor, who likewise responded on the merits to Petitioner's claims and the court itself, who challenged Petitioner at several points throughout the proceedings. These hearings went beyond the initial *Gallagher* phase, and constituted a critical stage on the merits of the claims, such that Petitioner was entitled to the appointment of counsel for that hearing.

In *State v. Gazda* (*supra*), this Court indicated that a hearing on the merits of an ineffective assistance of counsel claim is a critical stage. There, Gazda asserted that once the initial inquiry turned adversarial - when counsel responded to Gazda's complaints Court held that the district court erred by "failing to appoint an attorney for Finley at the post-trial hearing when it became apparent that counsel was taking an antagonistic position toward his client" (2003 MT 350, ¶ 27, quoting *Finley*, 276 Mont atb146, 915 P2d at 220). *Finley* was based in part on *United States v. Wadsworth* (830 F2d 1500 (9th Cir., 1987)) where the Ninth Circuit found there was a duty to appoint new counsel during an effectiveness of counsel hearing. Gazda relied on *United States v. Gonzalez* (113 F3d 1026 (9th Cir., 1997)) for the proposition that the district court created a conflict between himself and his counsel when it questioned defense counsel in Gazda's presence in open court (2003 MT 350, ¶ 32). In the instant case, this exact scenario occurred innumerable time throughout the hearings addressing Falla's effectiveness, as the district court directed questions directly to Falla addressing his representation of Petitioner.

This Court concluded that the lower court questioned defense counsel during an initial inquiry, "not a hearing on the merits of effective assistance of counsel" (*Id*). Accordingly, the Court held "that the critical stage in these proceedings begins with the actual hearing on the merits of the claim of ineffective assistance of counsel... The inquiry only serves to establish whether a defedant has a substantial claim; it is not a hearing on the merits of that claim" (*Id*, citations omitted).

Chief Justice Gray specifically concurred in *Gazda*, and noted that permitting counsel to respond to his or her client's allegations poses significant problems:

Responding “is essentially – at least in most cases – disagreeing with one's client. *At the moment counsel does so, the defendant is both unrepresented and prejudiced by having counsel testify against him or her* (2003 MT 350, ¶ 36 (emphasis added)).

Chief Justice Gray recommended that any response by appointed counsel to a request for appointment of new counsel must be delayed until after the court has made a seemingly substantial determination and appointed new counsel to represent the defendant in a hearing on the merits (*Id.*, at ¶ 37).

Chief Justice Gray's admonition is well-taken. Petitioner was opposed by his own attorney on claims of ineffective assistance of counsel, even going so far as to present exhibit evidence against his own client. Therefore, the district court left Petitioner unrepresented during the hearings. This constitutes a violation of his rights under the Sixth Amendment to the US Constitution and Article II, § 24 of the Montana Constitution.

Upon appeal, the State did not dispute the material facts regarding Falla's representation of petitioner and two jail inmates, Van Alstine and Allen, housed with Petitioner; the two inmates' cooperation with the State against Petitioner; nor, the facts developed at the trial court's inquiry (See Appellant's Brief (App.Br.), at 10-15; Brief of Respondent (Resp.Br.), at 11-14). It is clear that Falla represented these men at the same time that he represented Petitioner, and that Falla continued to represent Petitioner after he learned that his clients sought to give the State information which had a significant risk of prejudicing Petitioner's case.

The trial court conducted a hearing and heard from both Falla and Petitioner. The court issued a one-page order in which it found there was no evidence, apart from Petitioner's “conclusory allegations” that Falla had a conflict of interest precluding him from continuing to represent Petitioner, and upon

such conclusion, determined that there was no conflict, and Falla was not removed (DC 90; App.Br., Appendix Ex. B).

The flaw in the lower court's decision is that it was based solely on Petitioner's representations, and ignored the undisputed facts. At the hearing, Petitioner stated that he believed Falla had provided confidential information about his case to the other witnesses (See App.Br., at 14-15). The court rejected petitioner's beliefs as "conclusory." The court ignored the undisputed facts of Falla's joint representation, and then concurrent representation. It is these facts which demonstrate a clear conflict of interest which denied Petitioner his state and federal constitutional right to the effective assistance of conflict-free counsel.

The court did not cite any legal standard for its decision. Petitioner has heretofore noted this omission and substantiated that the United States Supreme Court has adopted differing standards for issues of conflict of interest, based on whether an objection was made known to the trial court, and whether the court inquired into the risk of conflict, specifically *Holloway*, *Cuyler* and *Mickens*, that this Court has tended to apply the *Cuyler* standard in a variety of factual situations and that this case does not fit within any of these standard scenarios, but on the facts, the *Holloway* test would be most appropriate, and prejudice should be presumed.

In response, the State relied on decisions which have applied the *Cuyler* test, citing *Deshon*, *Thurston*, *Hendricks*, and *Smerker*. The problem is that under *Cuyler*, the defendant must show both that an actual conflict existed, and that the conflict adversely affected his trial attorney's performance (*Deshon*, 2002 MT 16, at Paragraph 20); *Thurston*, 2004 MT 142, Paragraph 20 (defense counsel's prior role as a prosecutor was "not a basis for reversal unless Thurston is able to establish an 'actual conflict' existed."); *Hendricks*, 2006 MT 22, Paragraphs 16, 19 (there is no *per se* ineffective assistance of counsel, either where appointed defense counsel previously prosecuted the accused on another

matter, or where counsel also works simultaneously as a city attorney in the same jurisdiction; the accused would have to show that the conflict adversely affected defense counsel's performance, resulting in ineffective assistance)).

Petitioner meets the first part of this test. Mr. Falla had a conflict of interest. The State sought to distinguish the cases cited by Petitioner though on the basis that they were not factually on point. This attempt to distinguish the cases fails. Conflict issues are inherently fact-driven, but slightly differing facts does not obscure the fundamental premise that counsel owes a duty of loyalty to his client, and cannot represent conflicting interests.

The flaw in the State's argument is that the second part of this test does not apply in Petitioner's case. In the cases on which the State relies, the conflict issue was presented on direct appeal or in post-conviction proceedings. Counsel's trial performance could be reviewed, to determine whether the conflict adversely affected counsel's performance (See, e.g., *Deschon*, at paragraph 20 (“[n]othing in the record suggests that [counsel's] method of examination was in any way motivated by a desire to protect Lawrence's interests at Deschon's expense.”)(emphasis added))).

In this case, to the contrary, the conflict issue was raised before trial. The trial court could not assess counsel's performance at trial. The *Cuyler* standard, which is premised on a scenario in which the potential risk of conflict is not called to the trial court's attention, is an inappropriate standard on which to review the lower court's decision. The State's argument should have been rejected.

Falla knew he could not cross-examine Van Alstine or Allen (6/09/05 Tr., at 4-7). His conflict in continuing to represent Petitioner is apparent in Falla's proposed solution - have the court appoint new counsel, who could handle all matters relating to Frank Allen's testimony, including communicating with Petitioner, and to take the extraordinary measure of leaving the courtroom while Allen testified and was cross-examined. Falla maintained he did not have a conflict. If this were true, he would not

have have had to resort to such extreme measures.

Mr. Falla's remedy did not alleviate the constitutional violation. The State argued that the cases on which Petitioner relied were distinguishable on the facts. The State failed to develop however why the supposed different facts warrant a different outcome. The Court's conclusion in one of the cases cited by Petitioner demonstrates the inadequacy of the remedy adopted by the trial court:

At least under ABA Rule 1.9 an actual conflict exists as to Mr. Marabella's representation of Mr. Dyer. This is one of those rare cases to which the Court referred in *Wheat* [*v. United States*, 486 US 153, 108 SCt 1692, 100 LEd2d 140 (1988)]. In this case, Mr. Marabella acknowledges that he could not, under the canons of ethics, conduct the cross examination of his former client. His proposed solution, having a separate lawyer cross examine Mr. Jones, does not eliminate the conflict. At the very least, in order to represent his present client Mr. Marabella must be completely free and unfettered to analyze, characterize and repudiate the testimony of his former client in closing argument. Moreover, this judge views it as an almost impossible task for a lawyer to participate throughout the course of a trial but not suggest a single question or style for cross examination of the most important witness against his present client. It should be noted that in *Wheat*, the lawyer was prohibited from representing former and present clients even though all consented thereto. Mr. Jones has specifically refused to consent... Under the circumstances of this case, the court concludes that Mr. Marabella may not be allowed to represent Mr. Dyer. (*United States v. Cheshire*, 707 F. Supp. 235, 240 (D.La. 1989))

This Court reached the same conclusion, and implicitly rejected the notion that a *Cuyler* standard was appropriate, in *Borchert*. The same result should have been obtained here. The conviction should be reversed and Petitioner should be released from custody.

Alternatively, the trial court erred in denying Petitioner's request for appointment of new counsel, prior to the time when petitioner was informed of Falla's conflict. The refusal to appoint new counsel, and to ensure that the inquiry was not conducted in such a manner as to deny Petitioner his right to conflict-free counsel at that inquiry, as guaranteed by the Sixth and Fourteenth Amendments and Article II, Section 24 of the Montana Constitution, warrant reversal and release from custody.

Essentially, the district court denied Petitioner his constitutional right to the assistance of counsel unencumbered by a conflict of interest.

As the conviction was obtained upon unconstitutional grounds, this error warrants reversal and immediate release from custody.

II. Petitioner was denied his state and federal constitutional rights to confrontation and compulsory process when the district court denied his counsel access to information about the State's witness and leave to cross-examine the witness on facts relating to his criminal background, and these errors warrant reversal and release from custody.

Petitioner had constitutional rights to confrontation and compulsory process pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article II, §§ 17 and 24 of the Montana Constitution. The Confrontation Clause and the Compulsory Process Clause of the Sixth Amendment apply in state criminal proceedings (*Pointer v. Texas*, 380 US 400, 407-08, 85 SCt 1065, 13 Led2d 923 (1965); *State v. Beavers*, 1999 MT 260, 296 Mont 340, 987 P2d 371 (1999)).

A trial court's discretion in exercising control and excluding evidence of a witness' bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded to the defendant (*State v. Gommenginger*, 242 Mont 265, 274, 790 P2d 455, 461 (1990)). “There is no discretion, however, in properly interpreting the Sixth Amendment” (*State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont 299, 127 P3d 458 (2006)(citations omitted)).

The rulings of the district court denied Petitioner his due process rights to present a defense and confront the witness. That court erroneously applied Rule 608, MREvid, and precluded Petitioner, through his co-counsel Stufft, from obtaining information from the court records and from cross-examining Allen on his criminal background and motive to cooperate against Petitioner. The district court erroneously gave Rule 608, MREvid, preference over Petitioner's constitutional rights.

The constitutional protections afforded Petitioner in this case are well-established. “The right of an accused in a criminal trial to due process is, in essence, the right of a fair opportunity to defend against the State's accusations” (*Chambers v. Mississippi*, 410 US 284, 294, 93 SCt 1038, 35 Led2d 297

(1973)). Whether rooted in the Due Process Clause of the Fourteenth Amendment or the Confrontation Clause of the Sixth Amendment, “the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense” (*Crane v. Kentucky*, 476 US 683, 690, 106 SCt 2142, 90 Led2d 636 (1986)). Thus, a criminal defendant has “the right to put before a jury evidence that might influence the determination of guilt” (*Pennsylvania v. Ritchie*, 480 US 39, 107 Sct 989, 94 Led2d 40 (1987)). The right to present evidence “stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the states” (*Taylor v. Illinois*, 484 US 400, 409, 108 SCt 646, 98 Led2d 798 (1988)).

An accused person also has a constitutional right to confront the witness, and to demonstrate the bias or motive of prosecution witnesses (*Gommenginger*, 242 Mont at 272-73, 790 P2d at 460, citing, in part, *Davis v. Alaska*, 415 US 308, 94 SCt 1105, 39 Led2d 347 (1974)). In *Davis*, the trial court improperly restricted the defendant's attempt to demonstrate bias or motive of the State's witness through cross-examination. In the latter case, while counsel was permitted to ask the State's witness whether he was biased, counsel was unable to make a record from which to argue why the witness might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a specualtive and baseless line of attack on the credibility of an apparently blameless witness (See *Gommenginger*, 242 Moint at 272-73, 790 P2d at 460). While the right to cross-examine is subject to limitations, “that limitation cannot preclude a defendant from asking, not only 'whether [the witness] was biased' but also '*to make a record from which to argue why [the witness] might have been biased*'... 'Exposure to a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination” (*United States v. Schoneberg*, 396 F3d 1036, 1042 (9th Cir, 2005)(footnotes omitted)(emphasis added)).

This Court has long recognized that bias or motive is a permissible basis for impeachment (See. *e.g.*, *Gommenginger, supra*; *State v. Arlington*, 265 Mont 127, 140-41, 875 P2d 307, 315 (1994) (“[i]t is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility under [Rule 611(B)].” (citation omitted))).

This error was not harmless (See *Deleware v. Van Arsdall*, 475 US 673, 680, 106 SCt 1431, 89 LEd2d 674 (1986)). As a result of the trial court's decisions precluding discovery and limiting cross-examination, defense counsel was greatly limited in his efforts to portray Allen's motivations as something other than altruism. Co-counsel Stuftt knew that Allen had been convicted, but he could not pursue his line of cross-examination, and thereby to urge the jury to reject Allen's testimony. Falla knew this information, but could not provide it due to the previously asserted conflict of interest, and he had removed himself from the courtroom entirely during Allen's testimony at any rate. Stuftt was able to cross-examine Allen regarding lies he told his probation officer years before, and counsel was able to pursue the approach that the circumstances in jail made it unlikely that Petitioner would have said anything to Allen. The questions counsel was permitted to ask though were insufficient to establish motive. Consequently, the cross examination the district court allowed was insufficient to protect Petitioner's constitutional rights.

Holmes v. South Carolina (547 US 319, 126 SCt 1727, 164 LEd2d 503 (2006)), a case cited by State on appeal, supports Petitioner's position. In *Holmes*, the state court prevented Holmes from presenting evidence that another person was guilty of committing the murder for which Holmes was charged. The court relied on an evidence rule under which an accused person cannot introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict (126 SCt at 1729). The US Supreme Court reversed the exclusionary rule, holding that it “violates a criminal defendant's right to have a ”a meaningful opportunity to present a complete

defense””” (126 SCt at 1735). The Court held that the state evidence rule focused on the strength of the prosecution's case. However, where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact” (126 SCt, at 1734).

Here, the court's ruling precluded the defense from challenging fully the State's critical witness, who was called to undermine Petitioner's defense that he was asleep at the critical time. Traditionally, a jury, as fact-finder, would be called to make decisions as to the credibility of the witnesses. The jury here could not do so appropriately, because the defense was limited in the scope of its intended cross-examination of Frank Allen.

As the conviction was obtained upon unconstitutional grounds, this error warrants reversal and immediate release from custody.

III. Petitioner was unlawfully remanded to custody of the Department of Corrections upon release from prison, and whilst so confined has been deprived on constitutional liberties, and this warrants Petitioner's immediate release from custody.

Petitioner was sentenced on December 1, 2005, “to the Montana State Prison for a term of twenty (20) years with fifteen (15) of those years suspended.” Though generic conditions for parole and probation, at no point in the judgment is there a commitment to a probation sentence. In spite of this, upon release from prison, Petitioner was compelled to enter into a fifteen year probationary sentence, subject to the custody of the Montana Department of Corrections and the supervision of the Adult Probation and Parole Bureau. This confinement was not specifically ordered by the sentencing court, and as such Petitioner is being unlawfully detained.

A probationary sentence is a sentence served in lieu of incarceration (*Black's Law Dictionary*, 6th Edition). A suspended sentence is a sentence not served at the time it is imposed (*Ibid*). Clearly, the two forms of sentence are not the same, and constitute two separate sentences upon commitment: One

sentence is a form of custody and the other is not. In absence of a specific commitment to one or the other, an individual's liberty interest is violated by imposing either.

In the instant case, Petitioner's sentence was clear: Petitioner was committed to a fifteen (15) year *suspended* sentence. At no point in Petitioner's order is he committed to any period of probation; No specific period of time is assigned to commit Petitioner to a probationary sentence whatsoever. The sentencing court was quite specific in committing Petitioner to serve a specific period of fifteen (15) years of his sentence suspended, but makes absolutely no specification that Petitioner either serve a probationary sentence nor a period of time in which he would be expected to serve such. Absent any such language that Petitioner is to serve a specified period on probation in the content of his sentencing order, the Department of Corrections is without authority to impose it in its stead.

Though generic reference is made to conditions Petitioner would be required to fulfill were he subjected to either parole or probation, there is no period of commitment to either parole or probation in the context of his order, and his commitment to probation by the State is unconstitutional. In spite of this, the State has compelled Petitioner to be subjected to probationary custody to run concurrently with his suspended sentence simply upon the inference that a suspended and probation sentence are the same thing. This is clear error, since no definition in existence in American law defines them as such.

Under the rationality presented by the State, because Petitioner's sentence mentions parole and probation in the same context, Petitioner is actually subject to probation and parole at the same time, as well. Again, this rationality is clear error.

The Department of Corrections is a part of the executive branch of government and is prohibited by the constitutional separation of powers from assuming the powers of the judicial branch. "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others..." (Article III, Section 1 of the Montana Constitution). As

such, the Department of Corrections had no constitutional authority to amend Petitioner's sentence and compel him to serve a probationary sentence absent an order from the sentencing court.

Additionally, all citizens enjoy absolute protection from double jeopardy (Article II, Section 25 of the Montana Constitution; Fifth and Fourteenth Amendments to the United States Constitution). A person may not be subjected to multiple punishments for the same offense (*Benton v. Maryland*, 395 US 784 (1969)). The double jeopardy clause protects against a second prosecution for the same offense after conviction or acquittal, and against multiple punishments for the same offense (*Palazzolo v. Gorcyca*, 244 F3d 512 (6th Cir, 2001)). The constitutional right not to be placed in double jeopardy, being a vital safeguard in American society, should not be given a narrow, grudging application (*Green v. United States*, 355 US 184, 78 SCt 221, 2 LEd2d 199 (1957)).

The imposition of concurrent suspended and probationary sentences, regardless of whether imposed by a sentencing court or through the usurped authority of an executive branch office, constitutes multiple punishments for the same offense. In every definition of probation and suspended sentences, it is clear that each is a separate sentence and considered single, solitary punishments. Probation denotes a release of the defendant into the community under the supervision of a probation officer (*Moore v. State*, 585 So. 2d 738, 741 (Miss. 1991)), ie, supervised release, and is a form of custody (*United States v. Presley*, 487 F3d 1346 (11th Cir., 2007)). The definition of a suspended sentence is governed by federal law and includes all parts of a sentence that are not served, irrespective of the label attached under state law (*United States v. Ayala-Gomez*, 255 F3d 1314 (11th Cir., 2001)), and as such is not considered in custody (See, *Cotton v. Mabry*, 674 F2d 701 (8th Cir., 1981) (Petitioner not eligible for habeas relief for reasons of suspended sentence not being considered “in custody” within the meanings of 28 USC Section 2241(c)). Since a probation sentence is a form of custody served under supervision (*Valona*), and a suspended sentence is not one served at the time it is imposed, subsection

of both simultaneously comprise a dual punishment that is prohibited by the double jeopardy protections of the Montana and United States Constitutions.

Further, Petitioner was originally sentenced on or about December 1, 2005, and his conditions of sentence were imposed at that time. The sentencing court thereafter, upon petition from the State of Montana, modified those conditions on or about February 18, 2010, to exponentially increase the restraint upon his capacity to frequent public places, prohibit his identifying L.P. by name or having contact with any member of L.P.'s family, in the latter case essentially adopting terms of an appealed restraining order into Petitioner's six year old sentence. Such modifications were unconstitutional, and as such, these new restraints represent infringements upon Petitioner's liberty.

A district court is without jurisdiction to amend a valid judgment once imposed unless specifically provided for by statute (*Rivera v. Eschler*, 235 Mont 350, 352, 767 P2d 336, 338 (1989)). No statutory authority exists to impose probation, absent a violation of suspended sentence, when no supervision period was imposed in the first place. Likewise, no statutory authority exists for a district court to delegate its sentencing authority to the Department of Corrections for subsequent revisions (*State v. Hatfield*, 256 Mont 340, 347, 846 P2d 1025, 1029 (1993)).

Yet further, Petitioner is entitled to protection from cruel and unusual punishment (Article II, Section 22 of the Montana Constitution; Eighth and Fourteenth Amendment of the United States Constitution) , and the vague and overly broad conditions imposed upon him by the latest modification are malicious and inhumane. Petitioner has only been subjected to such conditions out of spite from a probation officer whose year-long effort to harass, provoke and intimidate Petitioner had failed to either compel him to confess to a crime which he had consistently maintained his innocence of nor granted him sufficient grounds upon which to return Petitioner to prison as consequence. The current conditions as modified are so vague and overly broad that Edwards can now violate Petitioner on a whim for any

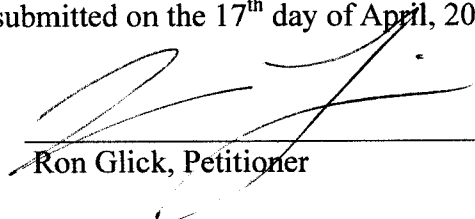
circumstance involving leaving his room, and this constitutes a gross infringement upon Petitioner's liberty and infliction of cruel and unusual punishment. Additionally, the modified conditions are being used to bar Petitioner from prescribed medical treatment, as his access to therapy is being unrealistically restricted by the present conditions, which constitutes deprivation of medical care and willful neglect

Still further, Petitioner is entitled to freedom of speech and expression (Article II, Section 7 of the Montana Constitution; First and Fourteenth Amendments of the United States Constitution). Specifically, Petitioner is entitled to "be free to speak or publish whatever he will on any subject..." (Article II, Section 7 of the Montana Constitution). The latest modification upon Petitioner's sentence imposes gross infringements upon this condition and unlawfully restrains Petitioner from expressing his own personal side of his conflict throughout his criminal prosecution, including his efforts to put forth the machinations and intimidations against L.P.

Consequently, Petitioner is being unconstitutionally detained and is entitled to immediate release from custody.

WHEREFORE, Petitioner does respectfully request of the Court to grant his petition for writ of habeas corpus and to order him release from custody without delay.

Petitioner does hereby attest, under penalty of perjury, that the foregoing is true and correct to the best of his ability to present, and that this is respectfully submitted on the 17th day of April, 2010.



Ron Glick, Petitioner